United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

Bob Giannoni
5-11-65
7- WEB - Tue 8
930 am

592

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,099

EGISTO JOSEPH VENTURINO, President, Local 904, National Federation of Federal Employees; ROBERT L. GRIFFITHS, President, Chapter No. 1 Federal Employees Management Association; DON B. DAVIDSON, JR.; ALEX S. SISTI; SAMUEL WARDWELL, JR.

Appellants

183

vs.

ROBERT S. McNAMARA, Secretary of Defense; EUGENE M. ZUCKERT, Secretary of the Air Force

Appellees

Appeal From The United States District Court for the District of Columbia

Daniel Y. Sachs
Suite 800, Denrike Bldg.
1010 Vermont Avenue N.W.
Washington, D.C. 20005

Counsel for Appellants

STATEMENT OF QUESTIONS PRESENTED

In the opinion of appellants, the following questions are presented by this appeal:

1. Whether, when the Secretary of Defense orders the closing of an installation in alleged violation of statute, employees affected by such order have standing to seek judicial review and intervention.

2. Whether such an action may be brought against the Secretary of Defense in propia persona, rather than against the United States, appellants having alleged that the Secretary has exceeded his statutory authority.

3. Whether the particular naming of the Secretary of Defense in a statute, conferring specific authority upon him, permits or compels a court to consider the legality of his actions in the light of the statute.

4. Whether this Court should or must assert jurisdiction over the subject matter, in light of the principle that an action in excess of statutory authority does not constitute the exercise of allowable discretion.

INDEX

	Page
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	2
STATEMENT OF POINTS	9
SUMMARY OF ARGUMENT	10
ARGUMENT	12
CONCLUSION	25

TABLE OF CASES

Air Transport Association of America v. Brownell, D.C.D.C., 124 F.Supp. 909 (1954)	20
Doehla Greeting Cards v. Summerfield, D.C.D.C., 116 F.Supp. 68 (1953)	20
* Dugan v. Rank, 372 U.S. 609 (1963)	14, 15
Frothingham v. Mellon, 262 U.S. 447 (1923)	12
* Greene v. McElroy, 360 U.S. 474 (1959)	22, 23, 24
* Harmon v. Brucker, 355 U.S. 579 (1958)	22, 23, 24
Ickes v. Fox, 300 U.S. 82 (1937)	20
Land v. Dollar, 330 U.S. 731 (1946)	16
* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949)	14, 16
Malone v. Bowdoin, 369 U.S. 643 (1961)	16

TABLE OF CASES (Cont'd)

	Page
McNeil v. Seaton, 108 U.S.App.D.C. 296 281 F.2d 931 (1960)	20
Pauling v. McElroy, 107 U.S.App.D.C. 372, 278 F.2d 252 (1960)	13
Pauling v. McNamara, ___ U.S.App.D.C. ___, 331 F.2d 796 (1964)	22
Philadelphia Co. v. Stimson, 223 U.S. 605 (1912)	20
Publicker Industries v. Anderson, D.C.D.C., 68 F.Supp. 532 (1946)	20
Reaves v. Ainsworth, 219 U.S. 296 (1911)	22
Rose v. McNamara, D.C.E.D.Pa., 225 F.Supp. 891 (1963)	20
Southern Railway v. United States, 167 F.Supp. 747	24
* Stark v. Wickard, 321 U.S. 288 (1944)	12
United States ex rel. Creary v. Weeks, 259 U.S. 336 (1922)	22
* West Coast Exploration Co. v. McKay, 93 U.S.App. D.C. 307, 213 F.2d 582 (en banc 1954), cert. denied 347 U.S. 989	15, 24
* Williams v. Fanning, 332 U.S. 490 (1947)	20

* Cases particularly relied upon

STATUTES

10 U.S.C.A. §125(a)(Supp. IV, 1958):	14, 16, 17 18, 20, 24

"Subject to section 401 of Title 50, the Secretary of Defense shall take appropriate action (including the transfer, reassignment, consolidation or abolition of any function, power, or duty) to provide more effective, efficient, and economical administration and operation, and to eliminate duplication, in the Department of Defense."

THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,099

EGISTO JOSEPH VENTURINO et al.

Appellants

vs.

ROBERT S. McNAMARA et al.

Appellees

Appeal From The United States District
Court for the District of Columbia

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

This appeal is taken from an order of the United States District Court dismissing appellants' complaint for lack of jurisdiction over the subject matter. Jurisdiction in the District Court was founded on 28 U.S.C. §1331(a) and

28 U.S.C. §1361 (1958 ed. Supp. IV), the matter in controversy exceeding $10,000 exclusive of interest and costs. Jurisdiction in this Court is based on 28 U.S.C.A. §1291.

STATEMENT OF THE CASE

The Rome Air Materiel Area (hereafter referred to as ROAMA) is located at Griffiss Air Force Base in Rome, New York. It is one of nine such Air Materiel Areas (AMA) in the United States under the Air Force Logistics Command (AFLC). The prime mission of the other eight is aircraft and missile maintenance and repair; the mission of ROAMA since its establishment in 1955 has been the procurement, installation, maintenance and repair of ground communications electronics equipment. In the course of the past ten years, all of the functions relating to such equipment have been centralized at ROAMA and its allied agencies at Griffiss Air Force Base. This centralization has resulted in the formation of a corps of highly skilled technicians at an ideal geographical location, close to the sources of procurement (the major electronics manufacturers in the Northeast) and close to the communications installations which ROAMA services: the Distant Early Warning System, Ballistics Missile Early Warning System, and SAGE.

On December 12, 1963, appellees announced the planned

closing of 33 installations, including ROAMA. Its functions were to be transferred to Air Materiel Areas at Sacramento, San Antonio, and Oklahoma City. The government has provided this picture of "before and after" personnel strength at ROAMA (Government Exhibit N, JA 35):

	Personnel Strength at ROAMA			
a. ROAMA (AFLC)	Today	End of 1967	Gross Reduction	Net AF Personnel Reduction
World-wide procurement and supply mission	2761	---	2761	1190
	***	***	***	***
Total	6873	3899	2974	1403

The phasing-out plan was tentatively developed along these lines:

Fiscal Year	Number of Positions to be Phased Out
1964	180 (6.5%)
1965	809 (29.2%) (199 eliminated, 610 relocated)
1966	1135 (41.2%)
1967	637 (23.1%)

An elaborate relocation programming plan was issued (Government Exhibit B). Under the plan ROAMA employees whose jobs were to be abolished were promised assistance in finding employment at other military installations or elsewhere in government. Those whose jobs were to be moved to another AMA

were urged to accept transfer with their function, because the employment picture at Griffiss and elsewhere in the Rome area was "not very bright." (Government Exhibit C, Memorandum on "Procedures for Reducing the Adverse Impact of Phase-Down on ROAMA Employees," dated 31 July 1964, JA 24)

In summary, the government foresaw gross manpower savings of 1190 spaces; total recurring savings resulting from the relocation of $8.6-$10.3 million; one-time relocation costs of not more than $6.3 million; and $5 million in construction costs at ROAMA saved over the next five years. (Government Exhibit N, JA 37)

The primary factual question raised by this action is the accuracy of appellees' claims regarding the savings to be realized by the relocation of ROAMA. Appellants contend that these claims are exaggerated and that, far from effecting a saving, the relocation may result in a net increase in expenditures.

In order to verify appellees' claims, Senators Keating and Javits of New York, and Congressman Pirnie of Rome, asked the Comptroller General to review the planned closing. The resulting report, which was issued in June 1964, is Plaintiffs' Exhibit A. The General Accounting Office concluded that about $2 million of the claimed savings for fiscal years 1965 through 1967, and $2.7 million of claimed savings for each year

thereafter were not properly attributable to the move. GAO also found that the $3.6 million which the Air Force had estimated would be required to build facilities at other AMAs to handle the functions transferred from ROAMA appeared to be understated by about $1 million. The report explained that GAO was unable to form conclusions as to the actual savings because

> the Air Force has not provided sufficient detailed support for the single most important factor affecting the estimates; that is, the number of personnel spaces that can be eliminated from AFLC's authorized personnel strength as a result of the transfer. (Plaintiffs' Exhibit A, JA 20)

The reason for the unavailability of this detailed support was that the analysis of personnel savings had been prepared by an officer at Headquarters AFLC, who had been instructed to destroy his detailed working papers, and did so. (Supra, JA 21) However, GAO did ascertain that the Air Force estimate of 1190 spaces eliminated included 255 warehousemen who would be dropped regardless of whether ROAMA functions were transferred. (Exh. A, page 11) The report also identified claimed savings in supplies and materials which could not be justified. (Supra, page 12) Lastly, the $5 million to be saved by the cancellation of new construction at ROAMA was dismissed as a consideration by GAO because "none of the planned projects included in the total had, as yet, been approved by AFLC for inclusion in a military construction program submitted to

Headquarters, USAF." (Supra, page 16)

The scope of the audit was severely limited, as the report makes clear on page one:

> Our review was directed primarily toward a verification of the accuracy of statistical data furnished by the Air Force in support of the decision to effect the transfer and an evaluation of the reasonableness of Air Force estimates of the savings anticipated as a result of the transfer. * * * From the information available in Air Force records, we could not determine whether equivalent or greater savings could be achieved through other means of realigning the structure of the Air Force Logistics Command. Our scope was further limited in that we cannot, from an audit standpoint, forecast the extent to which this transfer may affect the capability of the Air Force Logistics Command to perform its logistics support mission with respect to commodities managed by the Rome Air Materiel Area.

Nevertheless, it is clear from the data available to GAO that the savings claimed by appellees were overstated by one third, without including personnel savings, the accuracy of which could not be substantiated.

Appellants are aware that the relocation of the first contingents from ROAMA has necessitated the establishment at AFLC Headquarters of a new operation to coordinate former ROAMA activities at other AMAs. Moreover, the underlying assumption of the move is that employee productivity at ROAMA is the same as at the AMAs to which its functions are

to be transferred, so that no more employees would be required to do the work formerly done at ROAMA. Statistics assembled by appellants from government sources indicate that this is not in fact the case. Appellants' Exhibit D, "Additional Facts About ROAMA," shows that productivity as of September 1963 was substantially higher at ROAMA than at Sacramento or Oklahoma City, that total maintenance manhours at the latter decreased by 15.8% and 5.1% respectively, while ROAMA showed a 12.9% increase.* The task force from Oklahoma City which visited ROAMA to pave the way for transfer of functions to Oklahoma City learned that at ROAMA each employee was responsible for almost 40 percent more supply items than was his counterpart at Oklahoma City.

Those are the differences which can be assigned a dollar price tag. Efficiency and effectiveness, the next criteria by which the relocation of ROAMA must be judged, are not so easily quantified. However, the monetary value of the proximity of ROAMA engineers and scientists to their counterparts in the nearby electronics plants merits consideration, as does the cost of losing an expert with many years' service when he fails to accept relocation, and the cost of having to train someone else to do his job. Raymond C. Galen, Chief of the Employment and Placement Branch at ROAMA, has deposed

* J.A. 23.

that of the initial 404 employees who were offered functional transfers to other AMAs at their present grade and salary, 208 accepted such offers. (Gov't Exhibit M, JA 34) In subsequent contingents the number of acceptances has decreased, since those employees who were inclined to accept relocation have in large measure decided to go in advance of their scheduled departure time, leaving behind those who would reject relocation.

On August 3, 1964 appellants filed the present action seeking to enjoin the further execution by appellees of the ROAMA relocation. The District Court, after hearing oral argument on appellants' motion for a preliminary injunction and appellees' motion to dismiss, granted the latter motion for lack of jurisdiction over the subject matter. It is from this ruling that the present appeal is taken.

STATEMENT OF POINTS

The points relied upon by the appellants in this appeal are as follows:

1. Appellants have sufficient standing to bring this action and petition the Court for relief.

2. By ordering the relocation of ROAMA, appellees exceeded the authority vested in them by 10 U.S.C.A. §125(a) (Supp. IV, 1958); hence the doctrine of "unconsented suit" does not apply.

3. The aforementioned relocation order constitutes a violation of the mandates of 10 U.S.C.A §125(a); hence the executive decision was not discretionary and is judicially reviewable.

SUMMARY OF ARGUMENT

1. As employees of ROAMA and representatives of ROAMA employees, appellants possess a direct and personal interest in the relocation of ROAMA, an interest which is not shared with the people of Rome or the taxpayers generally, and this interest is sufficient to confer standing on appellants to petition the judiciary for relief.

2. The legislative warrant for the Secretary's order is found at 10 U.S.C.A. §125(a)(Supp. IV, 1958). The allegation in appellants' complaint that the Secretary of Defense has violated this statute by ordering the relocation of ROAMA is sufficient to confer jurisdiction and avoid dismissal for failure to join the United States as a necessary party and for failure to obtain the consent of the United States to be sued. Further, it is shown that the order to close ROAMA is in fact a violation of the statute, that the Secretary exceeded his statutory powers in ordering the closing, and that he may therefore be sued as an individual without the consent of the United States.

3. Suit against the Secretary of Defense is also justified because the statute specifically mentions him,

and because he personally can effect the relief sought by appellants.

4. Judicial review is not precluded simply because the decision to close ROAMA was made by the Secretary of Defense and arguably involves the administration of the Department of Defense. Judicial relief is available, without exception, whenever a government official exceeds his ~~express~~ or implied powers. Such action in excess of statutory authority cannot be justified as the exercise of administrative discretion. Moreover, the absence of specific statutory provision for judicial review and intervention is not a bar to protection by the judiciary against arbitrary action on the part of a government official.

ARGUMENT

I. APPELLANTS HAVE SUFFICIENT STANDING TO BRING THIS ACTION AND TO PETITION THE COURT FOR RELIEF.

As employees of ROAMA and as representatives of ROAMA employees, faced with the abolition of their jobs in violation of statute, plaintiffs have a legitimate interest which is entitled to judicial protection. This interest reaches beyond the general interest that citizens of the Rome-Utica area have in the continuance of ROAMA as persons concerned with the prosperity of their community, with the defense posture of the United States, or with its budget.

Whether this interest rises to the level of a privilege or a right is in this context a question which need not be decided. The Supreme Court requires no more of a plaintiff than that he possess "something more than a general interest in the proper execution of the laws" in order to invoke the judicial power; it requires that his interest "rise to the dignity of an interest personal to him and not possessed by the people generally." Stark v. Wickard, 321 U.S. 288, 304 (1944).

This is not a suit by a disgruntled taxpayer to prevent the expenditure of government funds for some allegedly improper purpose. Cf. Frothingham v. Mellon, 262 U.S. 447 (1923). It is not an action brought on behalf of the citizens of the world to prevent further atmospheric nuclear tests. Cf.

Pauling v. McElroy, 107 U.S.App.D.C. 372, 278 F.2d 252 (1960) certiorari denied 364 U.S. 835. Plaintiffs here allege that they are employees of ROAMA or employee representatives; that they are faced with immediate and irreparable harm by reason of the appellees' decision to close ROAMA; that the job tenders under the appellees' program of outplacement are illegal in that they offer substantially lower rates of pay at unacceptable locations; and that therefore appellees' order directly threatens their livelihood. To decide whether plaintiffs have sufficient standing to bring this action, this court need only decide whether these allegations indicate such a direct and personal interest in the subject matter of the litigation as the Supreme Court has held to be necessary to confer standing. Plaintiffs contend that they meet these requirements.

II. BY ORDERING THE RELOCATION OF ROAMA, APPELLEES EXCEEDED THE AUTHORITY VESTED IN THEM BY 10 U.S.C.A. §125(a)(Supp. IV. 1958); HENCE THE UNITED STATES IS NOT AN INDISPENSABLE PARTY AND THE DOCTRINE OF "UNCONSENTED SUIT" DOES NOT APPLY.

The Supreme Court in Dugan v. Rank, 372 U.S. 609 (1963) and Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) established the guidelines and outer limits of the "unconsented suit" doctrine -- the doctrine that an action nominally against a Government officer must fail if it is in reality an action against the sovereign, which has not consented to be sued. Such actions will fail unless the plaintiff can show "(1) Action by officers beyond their statutory powers and (2) even though within the scope of their authority, the powers themselves or the manner in which they are exercised are constitutionally void." Dugan v. Rank, supra, 621-622.

The presumed warrant for the Secretary's order closing ROAMA is 10 U.S.C.A. §125(a)(Supp. IV 1958) and the authority to order such closing could come only from the Congressional grant embodied in that section:

> "Subject to section 401 of Title 50, the Secretary of Defense shall take appropriate action (including the transfer, reassignment, consolidation or abolition of any function, power, or duty) to provide more effective, efficient, and economical administration and operation, and to eliminate duplication, in the Department of Defense."

Appellants contend that the Secretary of Defense, in ordering the closing and relocation of ROAMA, exceeded the authority conferred upon him by statute and that the suit is therefore properly against the Secretary of Defense and the Secretary of the Air Force as named individuals and is not an action against the United States.

Whether the Secretary did or did not act within the limits of his authority at once determines the jurisdictional issue, in accordance with the exceptions stated in Dugan v. Rank, supra, and the question on the merits: whether appellees' action was a violation of the statute and judicially reviewable, or whether it was within the realm of executive discretion and therefore non-reviewable. West Coast Exploration Co. v. McKay, 93 U.S.App.D.C. 307, 213 F.2d 582 (en banc, 1954), certiorari denied 347 U.S. 989.

Having established that the threshold jurisdictional question and the question on the merits were the same, this Court held in the West Coast Exploration Co. case, supra, that assertions in the complaint of want of power in an executive officer would be accepted and given their natural jurisdictional consequences in determining who is a necessary party, unless such assertions are "so unsubstantial and frivolous as to afford no basis for jurisdiction." 93 U.S.App.D.C. 307, 319, 213 F.2d 582, 593. The court noted that this method of solving the preliminary jurisdictional question had been

approved by the Supreme Court in Land v. Dollar, 330 U.S. 731 (1946). The result in Larson v. Domestic & Foreign Commerce Corp., supra, was explained by the absence from the complaint of any allegation that the War Assets Administrator had acted unconstitutionally or beyond his authority. In Malone v. Bowdoin, 369 U.S. 643 (1961), the Supreme Court confirmed this analysis, pointing out that in Larson the plaintiff had made no affirmative allegation of any ststutory limitation on the Administrator's powers.

In appellants' complaint it is specifically alleged that the order to close and relocate ROAMA was issued pursuant to, but in violation of, 10 U.S.C.A. §125(a). The allegation that appellees' order was a violation of the statute should suffice to confer jurisdiction on the court under the rule stated in Larson v. Domestic & Foreign Commerce Corp. and Malone v. Bowdoin, supra. It is implicit in the allegation of violation of the statute that the appellees acted in excess of the limitations specified therein.

Appellants would go further and show that the Secretary did in fact violate the statute. 10 U.S.C.A. §125(a) reflects the historical deep-seated concern of Congress that the military establishment be operated in an efficient and economical manner. Under this statute the authority granted by Congress to the Secretary of Defense, far from being unlimited, is so

hedged about with restrictions as to constitute a virtual mandate to the Secretary. "He shall take appropriate action." (Emphasis added) Congress directs the Secretary to take measures for the more efficient, economical and effective operation of the Department of Defense. The Secretary has a limited discretion, reflected in the word "appropriate," to determine how the Congressional mandate shall best be executed. But the measures taken must be appropriate. They must be reasonably calculated to produce greater economy and efficiency, and must in fact achieve this end. If they do not, they "conflict with the terms of /the Secretary's/ valid statutory authority" and are therefore the actions of the individual and not of the sovereign.

No ipso facto judgment can be made that the closing of a particular installation will effect economies without a thorough sifting of all available data. If, as part of a general cutback, the Secretary of Defense determines to close down an Air Materiel Area, the statute compels him to close the one least efficient to administer, least economical to operate, and whose mission and services can most easily be performed elsewhere. The closing of an installation may, to the contrary, result in greater expense, less efficiency, and, paradoxically, may cause duplication of facilities instead of eliminating it. Hindsight suggests that the closing of ROAMA

has in fact brought about the opposite results of those which were contemplated.

Even if hindsight is excluded, and the question of whether the Secretary acted ultra vires is confined to what he knew, or with reasonable diligence could have known, the conclusion must be the same. The facts known to the General Accounting Office as a result of its investigation and the facts known to appellants, military personnel stationed at ROAMA, and civilian personnel employed there were common knowledge in December 1963 and for some time prior to that date. The greater productivity of ROAMA employees compared with that of other Air Materiel Areas was known, as was the more intensive and efficient use of physical facilities at ROAMA and the other advantages of ROAMA set out in Plaintiffs' Exhibit D, "Additional Facts About ROAMA." The Secretary was either aware of these facts or did not attempt to become aware of them. If he was aware of them, his decision to proceed with the relocation of ROAMA in the face of these data was not simply a mistake, a lack of judgment, but a failure to execute the statutory mandate for economy and efficiency, and hence a violation of 10 U.S.C.A. §125(a). If he was not aware of them, his decision to proceed without a full understanding of the facts was equally an action in excess of his authority. An objective evaluation of available information

could not have produced a decision singling out ROAMA among all Air Materiel Areas for closing, as the least economical, least efficient, and least effective.

In short, the Secretary of Defense has the authority to close an installation and disperse its functions if, after sifting all the information at hand or reasonably to be acquired, he can make a sound judgment, on the basis of such information and to the exclusion of all other considerations, that economy, efficiency and effectiveness would be maximized by the closing of the base. No such informed judgment was made in this case. Appellees were therefore acting without authority in ordering the relocation of ROAMA, and this suit properly lies against them and not against the sovereign, under the maxim that when the agent acts outside the scope of the authority granted by his principal, he alone is liable.

III. SUIT IS PROPERLY BROUGHT AGAINST APPELLEES SINCE THEY CAN PERSONALLY GRANT THE RELIEF SOUGHT BY APPELLANTS.

The controlling statute, 10 U.S.C.A. §125(a), is a grant of authority and conferral of responsibility directly to the Secretary of Defense, named as such. It is undeniable that a court order requiring the Secretary of Defense under this statute to do something or refrain from doing something would effectively require the Secretary to carry out the Court's decree. This is not a case which, although nominally against the Secretary of Defense, attempts to reach past him into the United States Treasury. Cf. Rose v. McNamara, D.C.E.D.Pa., 225 F.Supp. 891 (1963).

The test in each case is whether the party sued can personally grant the relief sought by plaintiffs. Williams v. Fanning, 332 U.S. 490 (1947). Under this rule suits naming a Cabinet officer as defendant have consistently been upheld against Government contentions that the United States was the real party in interest and that the case should be dismissed as unconsented to. Philadelphia Co. v. Stimson, 223 U.S. 605 (1912); Ickes v. Fox, 300 U.S. 82 (1937); McNeil v. Seaton, 108 U.S.App.D.C. 296, 281 F.2d 931 (1960); Air Transport Assn. of America v. Brownell, D.C.D.C., 124 F.Supp. 909 (1954); Doehla Greeting Cards v. Summerfield, D.C.D.C., 116 F.Supp. 68 (1953); Publicker Industries v. Anderson, D.C.D.C., 68

F.Supp. 532 (1946). When a statute particularizes the Secretary of Defense as the executive officer charged with a responsibility under that statute, he is answerable, to the same degree as other Cabinet officers, when he fails to discharge it properly.

IV. THAT THE DECISION TO CLOSE ROAMA WAS MADE BY THE SECRETARY OF DEFENSE AND INVOLVES THE ADMINISTRATION OF THE DEPARTMENT OF DEFENSE SHOULD NOT PRECLUDE JUDICIAL REVIEW.

When an executive officer, acting without adequate information or in disregard of available information, makes a decision which contravenes an express statutory mandate directed to him, precedent permits a court to intervene to reverse that decision; policy compels it.

That the decision in this case was made by the Secretary of Defense is of course not the end of the matter. The Secretary is neither infallible nor sacrosanct in his decision-making. The courts are less and less willing to accord the Secretary untrammeled discretion in making a decision for no better reason than that he made it. Compare Reaves v. Ainsworth, 219 U.S. 296 (1911), and United States ex rel. Creary v. Weeks, 259 U.S. 336 (1922) with Harmon v. Brucker, 355 U.S. 579 (1958) and Greene v. McElroy, 360 U.S. 474 (1959). This is especially true when the Secretary's decision directly affects an individual or a definable class of individuals having a recognized right, privilege or interest sufficient to confer standing in court, as against, for example, a suit brought on behalf of the citizens of the world to challenge the nuclear strategy of the United States. Cf. Pauling v. McNamara, ___ U.S.App.D.C. ___, 331 F.2d 796 (1964)

The District Court, in Harmon v. Brucker, supra, held that it lacked the requisite power to review, control, or compel the granting of particular types of discharge certificates. 137 F.Supp. 475 (1956). The Supreme Court, reversing, said:

> "(J)udicial relief is available to one who has been injured by an act of a governmental official which is in excess of his express or implied powers. /Citations omitted/ The District Court had not only jurisdiction to determine its jurisdiction but also power to construe the statutes involved to determine whether the respondent did exceed his powers. If he did so, his action would not constitute exercises of his administrative discretion, and in circumstances such as those before us, judicial relief from this illegality would be available." (Emphasis added) Harmon v. Brucker, 355 U.S. 579, 581 (1958).

In Greene v. McElroy, supra, the Court of Appeals had been similarly hesitant to intervene in an area which was felt to be peculiarly suited to executive determination: the balance between individual rights and government security. The Supreme Court, undeterred by the thicket of executive discretion, held that whether or not the procedures for withholding a security clearance were proper, Greene's discharge without explicit Congressional and Presidential authorization was not. This distinction is a cogent one as it relates to the ROAMA relocation: the policy which prompted it may have been a reasoned one, but the execution of the policy through the closing of ROAMA was unlawful.

In view of the statutory limitations placed on the Secretary of Defense by 10 U.S.C.A. §125(a), it is incumbent upon this Court to review the Secretary's decision to close ROAMA, to determine whether the decision does in fact violate the statute. The absence of an express provision for judicial review ought not to be a deterrent, for, as this Court has said:

> "The due process clause of the Fifth Amendment endows the United States courts with power, even though there is no statutory provision for direct review of the action of a public officer, to protect against arbitrary action by such an officer." West Coast Exploration Co. v. McKay, ___ U.S.App.D.C. ___, 213 F.2d 582, 596.

In Harmon v. Brucker and Greene v. McElroy, supra, as well as in the instant case, the issue was whether the actions of the executive comported with previously-established legislative or administrative standards. The Secretary's action here must be tested against the dual standards of "economy" and "efficiency." These are objective yardsticks which courts have applied to a given set of facts and statistics. See Southern Railway Co. v. United States, 167 F. 747.

Courts are everyday charged with review of public utility rates, transportation tariffs, profits, and taxes. Such decisions require evaluation of data no more complex than that involved in deciding whether the relocation of ROAMA effects

the economy and efficiency demanded by Congress in the administration of the Department of Defense. There is no mystique about an Air Force installation which demands, or permits, that this multi-million dollar enterprise be treated differently from another multi-million dollar enterprise which happens to be a railroad, a telephone company, or the defense contractor whose representatives sit across the table from ROAMA agents. There is no taboo which bars a court from weighing relative costs between two or more Air Force installations, when the charge is made that the Secretary of Defense violated a statute by failing to make such an analysis, or, having done so, by disregarding it. Appellant requests that appellees be ordered to prove their case, and that a temporary injunction be issued pending a full hearing of the cause.

CONCLUSION

Wherefore, appellants respectfully request that this Court reverse the decision of the United States District Court and cause said Court to grant the injunction sought by appellants.

Daniel Y. Sachs
Counsel for Appellants
1010 Vermont Avenue N.W.
Washington, D.C.

CONTENTS OF JOINT APPENDIX

Complaint for Injunctive Relief and Declaratory Judgment, filed August 3, 1964 1

Amendment of Caption and Complaint, filed September 1, 1964 14

Motion for Preliminary Injunction, filed September 15, 1964 15

Motion to Dismiss, filed October 1, 1964 16

Opposition to Motion to Dismiss, filed October 16, 1964 17

Order, filed November 2, 1964, Tamm, J. 18

Notice of Appeal, filed November 25, 1964 18

Plaintiff's Exhibit A, letter dated June 25, 1964, Comptroller General to Senator Javits 19

Report on Department of Defense Plan to Transfer the Functions of the Rome Air Materiel Area 22

Plaintiff's Exhibit D (Excerpt), maintenance manhours tabulation 23

Defendants' Exhibit C, letter of July 31, 1964, from Office of Commander, Rome Air Materiel Area to Roama employees 24

Letter of July 2, 1964, from Air Force Logistics Command, "Procedures for Reducing the Adverse Impact of Phase-Down on ROAMA Personnel" 26

Defendants' Exhibit M, affidavit of Raymond C. Galen 33

Defendants' Exhibit N, Plan for Relocation of the Procurement and Supply Mission of the Rome Air Materiel Area (Excerpt) 35

Joint Appendix

[Filed Aug. 3, 1964]

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

EGISTO JOSEPH VENTURINO: 1551 Brinkerhoff Avenue, Utica, New York; ROBERT L. GRIFFITHS, Maple Drive, Rome, New York; DONALD B. DAVIDSON, 1115 North James Street, Rome, New York; ALEX S. SISTI, 15 Cedarbrook Crescent, Whitesboro, New York; SAMUEL WARDWELL, Jr., 238 Dale Road, Rome, New York	)	
Plaintiffs	)	Civil Action No. 1881 - '64
vs.	)	
ROBERT S. McNAMARA, Secretary of Defense, Washington, D.C.; EUGENE M. ZUCKERT, Secretary of the Air Force, Washington, D.C.	)	
Defendants	)	

COMPLAINT FOR INJUNCTIVE RELIEF AND DECLARATORY JUDGMENT

1. This Court has jurisdiction over this case under 28 U.S.C. §1331(a) (1958 ed.) and 28 U.S.C. §1361 (1958 ed. Supp. IV). The matter in controversy exceeds $10,000 exclusive of interest and costs.

2. This is a suit to enjoin the relocation of the Rome Air Military Area, hereinafter designated as ROAMA, from Griffiss Air Force Base in Rome, New York, to five other locations in the United States, and is brought to obtain a permanent injunction herein, to obtain temporary injunctive relief, or, in the alternative, to obtain a declaratory judgment; and to obtain such other and further relief as may be necessary and proper. This action arises under the provisions of 10 U.S.C.A. §125, as hereinafter more fully set forth.

3. Plaintiff Egisto Joseph Venturino, an adult citizen of the United

States, is President of Local 904, National Federation of Federal Employees, Rome, New York, an unincorporated association of Civil Service employees employed at Griffiss Air Force Base by the United States Air Force. He was duly authorized to join in this action on behalf of the members of said Local by a majority vote of the membership of said Local at a duly called meeting held July 23, 1964, a quorum being present.

4. Plaintiff Robert L. Griffiths, an adult citizen of the United States, is President of Chapter No. 1, Federal Employees Management Association, Rome New York, an unincorporated association of Civil Service Employees employed at Griffiss Air Force Base by the United States Air Force. He was duly authorized to join in this action on behalf of the members of said Association by a majority vote of the membership of said chapter at a duly called meeting held July 23, 1964, a quorum being present.

5. Plaintiff Donald B. Davidson, an adult citizen of the United States, is employed as a Logistics Officer at ROAMA by the United States Air Force.

6. Plaintiff Alex S. Sisti, an adult citizen of the United States, is Chief of the Accounts Control Branch of the Accounting and Finance Division, ROAMA.

7. Plaintiff Samuel Wardwell, Jr., an adult citizen of the United States, is president and principal stockholder of Wardwell Hardware Co., a New York corporation doing business in Rome, New York, since 1847. He is a former Mayor and Councilman of the City of Rome, and an active member of the Chamber of Commerce.

8. Defendants are Robert S. McNamara, Secretary of Defense of the United States of America; and Eugene M. Zuckert, Secretary of the Air Force.

9. This is a class action brought by plaintiffs suing in their own

behalf as well as on behalf of all others similarly situated as employees of ROAMA or as persons whose livelihood depends on the continued presence of ROAMA at Griffiss Air Force Base. Such persons are so numerous, as hereinafter more particularly set forth, as to make it impracticable to bring them all before this Court; and the rights which are the subject of this action are common to the plaintiffs and to all other such persons.

10. On or about December 12, 1963, the defendant Secretary of Defense McNamara publicly initiated actions to discontinue or substantially reduce activities at 26 Zone of the Interior installations. Among the activities ordered closed or relocated was ROAMA, a facility employing more than 6,000 civilian employees and 1,500 military personnel, who procure, receive, store, ship and maintain communications electronics equipment for Air Force installations around the world. In his announcement on or about December 12, 1963, the Secretary of Defense set a deadline of June 30, 1966 for completion of this relocation.

11. On or about December 16, 1963, the Commanding General of ROAMA was advised of the relocation order described in Paragraph 10 above and thereupon commenced relocation processes, issuing a general notification of reduction in force to all employees of ROAMA, in breach of the representations and promises made previously by the defendants and their authorized agents, as more specifically alleged hereinafter.

12. On or about March 11, 1964, many ROAMA employees were offered positions at Air Materiel Areas in Sacramento, California; Oklahoma City, Oklahoma; San Antonio, Texas; and Middletown, Pennsylvania. Many such job offers do not constitute legal job tender within the scope of the program of outplacement laid out in directives issued by the defendant Secretary of Defense and defendant Secretary of the Air Force because such job offers were at substantially lower rates of pay, and at unacceptable locations. Acceptance of such job

offers by plaintiff Davidson and other affected civilian employees of ROAMA would cause them immediate and irreparable harm because of decreased income, and because of the loss and sacrifice entailed in relocating. Rejection of said offers likewise will cause plaintiff Davidson and other affected civilian employees to suffer immediate and irreparable loss and damage because the commanding general of ROAMA in the general notice mentioned in paragraph 11 above stated that employees declining job offers at other locations would be removed from further consideration in this respect.

13. Plaintiff Samuel Wardwell, Jr., will suffer immediate and irreparable loss and damage by reason of the transfer from Rome, New York, of almost 1,500 civilian employees within the next 24 months and the termination of employment of another 1,500 employees, many of whom are customers of said plaintiff's business.

14. The ROAMA relocation was ordered by the defendant Secretary of Defense McNamara pursuant to authority granted by Congress in Public Law 87-651, 10 U.S.C.A. §125 (formerly in 5 U.S.C. §171a(c) (1958 ed.)). However, the Secretary of Defense violated said statute and abused the discretion thereby vested in him by disregarding vital military and economic considerations specifically set forth below.

15. On or about June 30, 1964, the Comptroller General released a report based on a study of the ROAMA relocation made by the General Accounting Office (GAO) at the request of Senators Keating and Javits of New York, and Representative Pirnie of Rome. The GAO report reviews the economies claimed by the Air Force to result from the closing of ROAMA and the transfer of its functions.

> "Of the estimated savings of $11.8 million for fiscal years 1965 through 1967 and the anticipated annual savings thereafter of about $9.9 million a year, [the GAO was] able to identify about $2 million and $2.7 million, respectively, which did not appear to be savings properly attributable to the transfer of GAO func-

> tions. [The GAO was] unable to determine the reasonableness of the balance of the Air Force savings estimate because the Air Force has not provided sufficient detailed support for the single most important factor affecting the estimates; that is, the number of personnel spaces that can be eliminated from [the Air Force Logistics Command's] authorized personnel strength as a result of the transfer."

The reason for the Air Force's inability to supply the detailed analysis to support its estimate of reductions in personnel strength was that the officer who had prepared said detail papers "was instructed to and did destroy said papers." The wilful and knowing destruction of these papers the plaintiffs contend was a direct violation by the defendant Secretary of the Air Force or his authorized agents of Chapter 16, Section 1 (160102 and 160102. I) of the Air Force Manual. In short, because of the destruction of these papers, the General Accounting Office was unable to ascertain whether the over-all savings estimates of the Secretary of the Air Force were reasonable.

16. The defendant Secretary of Defense, the defendant Secretary of the Air Force, and their authorized agents assert that the work being performed at ROAMA can be performed elsewhere in existing facilities, but said defendants' present position conflicts sharply with information furnished by the said defendants' authorized agents to the Comptroller General when he began the ROAMA investigation in January 1964 as aforesaid. At that time defendants' authorized agents reported that there would be $6.3 million in moving costs and that this figure included approximately $3.6 million for building "new administrative facilities" at the Sacramento, Oklahoma City and San Antonio Air Materiel Areas, and "humidity controlled" storage plant at the Middletown, Pennsylvania Air Materiel Area.

17. The relocation of ROAMA will destroy an experienced complex consisting of ROAMA, Rome Air Development Center (RADC), Ground Electronics Engineering Installation Agency (GEEIA), and Mobile Depot

Activity (MDA), all located at Griffiss Air Force Base and all concerned with the design, development, procurement, storage, shipping, installation, maintenance and repair on site and off site of ground communications electronics supervised by the Air Force for the Department of Defense.

18. In violation of their obligations to plaintiffs and those similarly situated, and in violation of the duty imposed upon them by statute, the defendants Secretary of Defense and Secretary of the Air Force have abused their discretion in failing to adequately weigh the following economic consideration:

a. ROAMA employs almost 6,000 civilians. Together with other Griffiss Air Force Base Military organizations, it is the largest employer in an area which had a workforce of 127,900 in November 1963. Of this number, 7,100 or 5.6% were jobless; these statistics place the Utica-Rome Labor market at number 106 out of 150 Labor market areas in the United States.

b. For years the Utica-Rome area's annual average rate of unemployment has been consistently higher than that of the nation and New York State. Data from the Bureau of Employment Security, U.S. Department of Labor, shows this rate in 1963 was 11% above the national average and 13% above the state average.

c. Utica-Rome was in a "D" Labor market classification in 1963, half of 1962, and almost all of 1961. In the first quarter of 1961, the classification was "E", meaning a Labor surplus of 9-11.9%.

d. ROAMA is the only Air Materiel Area in a "D" Labor market.

e. The Utica-Rome Labor market area since 1951 has received state and federal unemployment benefits exceeding $95 million. Of this sum, $60 million has been received since January 1958.

f. ROAMA employees who do not move will be eligible for federal unemployment benefits and job retraining. The U.S. Department of

Commerce estimates the average cost of recreating a single construction job, for example, in a depressed area at $4,230 for one year; if ROAMA is relocated, such costs could exceed $13 million a year in the Utica-Rome Labor market.

g. Dispersal of ROAMA would trigger many other applications for benefits. Employment in private manufacturing in Utica-Rome has followed a declining trend: between January 1957 and January 1963, the number of jobs in manufacturing decreased 6,400 from 44,800 to 38,400.

19. In addition to those cited in Paragraph 18, dispersal of ROAMA would have severe secondary economic effects. It would

a. deflate an already depressed Labor market, discourage commercial investments and private manufacturing in Central New York;

b. disrupt a young electronics industry in New York's depressed Mohawk Valley;

c. deplete retail sales by the loss of millions of payroll dollars in Central New York;

d. decrease the use of housing, schools, churches, and other public structures built or expanded on the assurances that ROAMA would stay, as more specifically alleged in Paragraph 22;

e. depreciate the value of expanded facilities and burden remaining property owners with upkeep costs of new facilities which would not have been built except to serve civilian and military personnel of ROAMA: and

f. irreparably harm the economy of Central New York, all to the detriment, loss and damage of plaintiffs and others similarly situated.

20. In violation of their obligations to plaintiffs and others similarly situated, and in violation of the duty imposed upon them by statute, the defendants Secretary of Defense and Secretary of the Air Force

have abused their discretion in failing to adequately weigh the following defense capability considerations:

a. The Defense Department's master plan for communications electronics 10 years ago intended ROAMA to be just such a communications electronics center, and more than $120 million was spent to consolidate communications electronics at ROAMA and other Griffiss Air Force Base components.

b. Manpower savings of 10,000 to 15,000 are possible if such a plan of consolidating Air Force activities at specialized centers is carried to its logical conclusion. Such a plan of consolidation is consistent with the Defense Supply Agency concept to which the defendant Secretary of Defense is publicly committed but which he violates in the dispersal of ROAMA.

c. Cost reduction savings at ROAMA for Fiscal Year 1964 (FY 64) exceeded its assigned goal of $162 million; net operating costs at Griffiss ROAMA for FY 61 through FY 64 have decreased almost $6000 per civilian employee per year; authorized civilian manpower at ROAMA dropped from 6,130 in FY 61 to 5,788 in FY 64. Yet between FY 59 and FY 63, prime provisioning items handled by ROAMA increased 132%; contractual actions rose 139% and service engineering items gained 54%, despite the above-mentioned savings in costs and manpower.

d. ROAMA is the closest depot to key electronics manufacturers in the Northeast; 65% of the basic industry is within 300 miles of Griffiss Air Force Base; dispersal of ROAMA would weaken the obvious benefits of having communications electronics logisticians so near to their sources of supply; ROAMA is also the closest depot to principal communications electronics users in the North Atlantic, Arctic, and Canadian warning and detection networks.

e. ROAMA is readily accessible from all parts of the nation by commercial and military air, New York Central Railway, Seaway, Barge

Canal, and New York State Thruway; it has flyable weather approximately 98% of the time, one of the best records in the United States Air Force; the electronics complex at Griffiss Air Force Base has the best Air Force record in recruiting and keeping professional personnel; and there is no shortage of qualified employees and no serious competition by industry for their services in the Utica-Rome area.

f. Costs of dispersing ROAMA are estimated at $36 million over a three-year period, a figure which includes moving personnel, materiel, and records, termination or transfer of ROAMA contracts, loss of the training and experience acquired by almost 3,000 civilian employees and 500 military personnel, most of whom must be replaced at new locations.

g. Of all the Air Materiel Areas, only ROAMA has reached the stage where research and development, procurement, logistics, engineering and installation experts participate side-by-side in Air Force communications electronics; it is this unique operation which saves taxpayers' dollars. To reconstruct this complex at five or six other locations will cost much more than the initial dispersal expenses of $36 million.

21. Dispersal of ROAMA will have serious effects on the military preparedness of the United States, as follows:

a. Gaps will occur in early warning, detection, and command and control systems operated by the United States Air Force because their logistical support will be disrupted during the ROAMA relocation.

b. Communications electronics supply problems and personnel dislocations before and after the ROAMA relocation begins in August 1964 will seriously impede the efficiency of the systems mentioned in (a) above.

c. Many essential, skilled personnel will be lost to the Air Force through the proposed relocation, as a result of their inability to move

for family, financial or other reasons.

d. Communications electronics support will be secondary to aircraft or missile support at other depots; this would never be the case at ROAMA, whose prime mission always has been communications electronics.

22. On or about October 7, 1961, the defendant Secretary of Defense by his authorized agent, Assistant Secretary of Defense Thomas D. Morris, advised and assured New York State Legislators, and thereby citizens of Rome, including plaintiffs, that ROAMA was needed, that its missions would be continued, total manpower would not fluctuate, and that there was no plan to disperse the mission or deactivate ROAMA, knowing that the plaintiffs and other persons similarly situated would rely on such assurances. On or about March 22, 1963, the defendant Secretary of the Air Force, by his authorized agent, the Commanding General of ROAMA, announced to and assured the citizens of Rome that there would be at ROAMA only relatively small changes or adjustments, that ROAMA had a bright future, and that there would be no adverse changes at ROAMA affecting employment, missions, or payrolls, said assurances being made with full knowledge that plaintiffs and other persons similarly situated would rely thereon. Other Department of Defense officials, between 1961 and late 1963, repeatedly gave assurances that ROAMA would remain active at Rome, even though the defendant Secretary of Defense and defendant Secretary of the Air Force since December 12, 1963 have said that the ROAMA relocation order is based on studies made prior to the above-mentioned assurances and during the period covered by the above-mentioned representations.

23. The defendant Secretary of Defense knowingly misrepresented the nature of the ROAMA relocation by including it in a list of "surplus or unnecessary bases," when in fact he well knew that the entire logistics mission of ROAMA would be continued and expanded following the dispersal of such mission to other bases and the ultimate effect of the

ROAMA relocation would not be a reduction of personnel within the Air Force Logistics Command, as indicated by a report of a task force appointed by the Commanding General of the Air Force Logistics Command in March and April 1964 at Griffiss Air Force Base; and by such misrepresentation misled the employees of ROAMA and the residents and taxpayers of the Utica-Rome area, to their detriment.

24. In reliance on the truth of the public representations specifically alleged in Paragraph 22 above, plaintiff Samuel Wardwell, Jr., and other businessmen in the Utica-Rome area similarly situated invested large sums of money, modernized their places of business, constructed new buildings, expanded their services and otherwise changed their positions and took actions to their detriment and damage.

25. In reliance on the truth of the representations specifically alleged in Paragraph 22 above, the City of Rome and the Enlarged School District of the City of Rome, to which plaintiffs pay taxes, spent or made plans to spend $10 million during the past 13 years on expansion of their physical plants and services, including those needed to augment municipal services rendered to Griffiss Air Force Base and further spent or made plans to spend $15 million in new school construction, most of which resulted from the need for facilities for approximately 5,000 children of military and civilian personnel at ROAMA. The bonded indebtedness of the City of Rome, excluding the Enlarged School District of the City of Rome, increased by approximately $3 million during the last twelve years and plaintiffs will be required to pay increased taxes to amortize said indebtedness for many years to come.

26. Moreover, in reliance on the public representations specifically alleged in Paragraph 22 above, and other similar representations by defendants and their authorized agents, business in the Utica-Rome area undertook extensive Urban Renewal projects, constructed motels, residences and other rental properties, undertook bank expansion and other capital improvements in order to meet the needs of the military

and civilian personnel of ROAMA, whose buying power and economic impact on the Utica-Rome area is estimated to be about 15 to 20 per cent of the total buying power and economic impact of all residents; the County of Oneida and State of New York, to which plaintiffs also pay taxes, have spent during the past twelve years an estimated $150 million for expansion of hospital, airport, highway, technical school and other capital facilities to serve the needs of the civilian and military personnel of ROAMA, much of which they would not have done had such representations not been made by defendants and their authorized agents.

26. By reason of their failure to weigh adequately the pertinent economic and military considerations as aforesaid, the defendant Secretary of Defense Robert S. McNamara has violated Title 10, Section 125 of the United States Code Annotated, Public Law 87-651, and abused the discretion reposed in him thereby, in that he has demonstrably failed to show that the closing of ROAMA and dispersal of its mission will "provide more effective, efficient and economical administration and operation, and * * * eliminate duplication, in the Department of Defense." By reasons of such violation of the statute, and by reason of their justifiable reliance on the premises and assurances of the defendants and their authorized agents, the plaintiff civilian employees of ROAMA, and the plaintiff businessmen of Rome, New York, and others similarly situated, will suffer irreparable loss and damage if the relief prayed for is not granted and the threatened relocation of ROAMA is permitted to take place as planned. Said plaintiffs have no adequate remedy at law to redress such threatened wrongs and illegal acts.

WHEREFORE, the plaintiffs and each of them, on their own behalf and for all others similarly situated, pray:

1. That the Court enter its order enjoining defendants and each of them, and their officers, agents and employees, and all persons in active concert or participating with them, from in any manner encourag-

ing, ordering, engaging in or taking any part in relocating the Rome Air Materiel Area from Griffiss Air Force Base at Rome, New York, or from in any manner interfering with or affecting the orderly continuance of the present mission at said facility (ROAMA), and from taking any action which would interfere with the Court's jurisdiction in the premises; and

2. That the Court, pending final determination of this cause, issue a preliminary injunction, restraining and enjoining defendants, and each of them, and their officers, agents, and employees, and all persons in active concert or participation with them, in the manner and form aforesaid; or, in the alternative,

3. That the Court enter a declaratory judgment declaring that the defendant Secretary of Defense has violated the law inherent in Title 10, U.S. Code Annotated, Section 125 (Pub. L. 87-651), by not following its provisions.

4. That this Court grant plaintiffs such other and further relief as may be necessary, just, and proper.

/s/ Daniel Y. Sachs
Attorney for Plaintiffs

Of Counsel:

Emlyn I. Griffiths
Rome, New York.

EGISTO JOSEPH VENTURINO, et al., President Local 904, National Federation of Federal Employees; ROBERT I. GRIFFITHS, President of Chapter No. 1, Federal Employees Management Association; DON B. DAVIDSON, JR.; ALEX S. SISTI; SAMUEL WARDWELL, JR. Plaintiffs	)	
vs	)	Civil Action No.
ROBERT S. McNAMARA, Secretary of Defense; EUGENE M. ZUCKERT Secretary of the Air Force Defendants	)	1&81-'64

[Filed Sept. 1, 1964]

AMENDMENT OF CAPTION AND COMPLAINT

Come now the plaintiffs herein, by counsel, and ask leave of this Court to amend the caption of their complaint as shown above; that is, by adding beneath plaintiff EGISTO JOSEPH VENTURINO's name his title as President of Local 904, National Federation of Federal Employees, and by adding beneath plaintiff ROBERT L. GRIFFITHS' name his title as President of Chapter No. 1, Federal Employees Management Association, both of the aforesaid changes being made to indicate that said plaintiffs bring this action in their representative capacity as officers of the said employee organizations; and by adding to plaintiff DON B. DAVIDSON's name the suffix "JR."

In addition, plaintiffs herein, by counsel, ask leave to amend their complaint by adding, on page 16 of the original complaint, the following verification:

"DISTRICT OF COLUMBIA, ss:

Daniel Y. Sachs on oath deposes and says: that he is the attorney for the plaintiffs named herein; that all of said plaintiffs are nonresidents of the District of Columbia and absent therefrom; that he has

prepared this complaint; and that the facts therein set forth are true to the best of his knowledge, information, and belief.

Daniel Y. Sachs
Attorney for Plaintiffs

Subscribed and sworn to before me this ___day of _____, 1964.

Notary Public -- D.C."

[Filed Sept. 15, 1964]

MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs move the Court for a preliminary injunction enjoining the defendants and each of them, and their officers, agents, and employees, and all persons in active concert or participating with them, from in any manner encouraging, ordering, engaging in or taking part in the relocation of the Rome Air Materiel Area (ROAMA) from Griffiss Air Force Base at Rome, New York; from encouraging, ordering, engaging in or participating in the relocation of personnel from ROAMA to other Air Materiel Areas in the Continental United States; or from in any like manner or other manner interfering with or affecting the orderly continuance of the present mission at ROAMA: and from taking any action which would interfere with this Court's jurisdiction in the premises, pending the final hearing and determination of this action.

The grounds of this motion are as follows:

1. Unless restrained by this Court defendants will perform the acts referred to;

2. Such actions by the defendants will result in irreparable injury, loss and damage to the plaintiffs, as more particularly appears in the

verified complaint and the affidavits of Robert L. Griffiths, Don B. Davidson. Jr., Samuel Wardwell, Jr., and David C. Smith, annexed hereto;

3. The issuance of a preliminary injunction herein will prevent irreparable injury to the plaintiffs.

4. The Memorandum of Points and Authorities annexed hereto and made a part hereof.

/s/ Daniel Y. Sachs
Daniel Y. Sachs
Attorney for Plaintiffs

[Certificate of Service]

[Filed Oct. 1, 1964]

MOTION TO DISMISS

Defendants through their attorney, the United States Attorney for the District of Columbia, move to dismiss the complaint herein for lack of jurisdiction over the subject matter on the grounds that:

(1) this is a suit against the sovereign to which it has not consented;
(2) plaintiffs lack standing to sue;
(3) plaintiffs have otherwise failed to set forth a case or controversy because the action of which they complain is committed to the discretion of defendants and is not judicially reviewable.

Incorporated herein and made a part hereof by reference are certified copies of documents of the Department of Defense and of the

Air Force relative to the action of which plaintiffs complain.

/s/ Messrs. David C. Acheson
United States Attorney
Charles T. Duncan,
Joseph M. Hannon
and Ellen Lee Park
Ass't. United States Attorneys

[Certificate of Service]

[Filed Oct. 16, 1964]

OPPOSITION TO MOTION TO DISMISS

Plaintiffs through their attorney oppose defendants' motion to dismiss for lack of jurisdiction over the subject matter, and as grounds for such opposition state:

(1) This suit is properly brought against the defendants as individuals; it is not a suit against the sovereign for which its consent is required;
(2) Plaintiffs have the requisite standing to bring this action;
(3) The actions taken by defendants which plaintiffs herein seek to enjoin are statutory violations which this court may take cognizance of and judicially review.

For these reasons, as more fully set forth in the accompanying Memorandum of Points and Authorities, plaintiffs request that the court deny defendants' motion to dismiss and grant the injunction sought by plaintiffs.

Daniel Y. Sachs
Attorney for Plaintiffs

[Certificate of Service]

[Filed Nov. 2, 1964]

ORDER

This cause having come before the Court on plaintiffs' motion for preliminary injunction and defendants' motion to dismiss, and it appearing to the Court that it lacks jurisdiction over this cause and that plaintiffs' complaint should be dismissed, and that such determination renders moot plaintiffs' motion for a preliminary injunction, it is by the Court this 2d day of November, 1964.

ORDERED that plaintiffs' motion for a preliminary injunction be and it hereby is denied, and it is further

ORDERED that defendants' motion to dismiss be and it hereby is granted, and that the complaint herein be and it hereby is dismissed.

/s/ Edward A. Tamm
United States District
Judge

[Certificate of Service]

NOTICE OF APPEAL

Notice is hereby given this 25th day of November, 1964, that EGISTO JOSEPH VENTURINO, President, Local 904, National Federation of Federal Employees; ROBERT L. GRIFFITHS, President, Chapter No. 1, Federal Employees Management Association; DON B. DAVIDSON, JR.: ALEX S. SISTI: and SAMUEL WARDWELL, JR.
hereby appeal to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 2d day of November, 1964 in favor of defendants against said plaintiffs.

/s/ Daniel Y. Sachs
Attorney for plaintiffs

PLAINTIFF'S EXHIBIT A

COMPTROLLER GENERAL OF THE UNITED STATES
Washington, D. C. 20548

B-153174 June 25, 1964

Dear Senator Javits:

Enclosed is our report on the Department of Defense plan to transfer the functions of the Rome Air Materiel Area from Griffiss Air Force Base, New York. Our review was undertaken at your request made jointly with Senator Kenneth B. Keating and Congressman Alexander Pirnie, in which you asked that we review the Department of Defense plans to close the Rome Air Materiel Area and the Schenectady Army Depot. Our findings with respect to the latter installation were submitted to you by letter dated March 16, 1964 (B-153174).

The Air Force has stated that it was decided to reduce the organizational structure of the Air Force Logistics Command from nine air materiel areas to eight as a result of a continuous decline in recent years in the scope of the Logistics Command's operations. The Air Force selected the Rome Air Materiel Area for closing primarily because its workload can be relocated to other air materiel areas which have some experience in managing equipment similar to that presently managed at Rome and because these other air materiel areas have overhaul and maintenance capabilities that are lacking at Rome. The Air Force has stated that all the air materiel areas except Rome have huge investments in major industrial overhaul and repair facilities which would be extremely difficult and costly to relocate.

The Air Force estimated that significant savings in personnel and various operating expenses would be realized by consolidating the functions of the Rome Air Materiel Area with those of other air materiel areas and that these savings would be substantially greater than the relocation costs which would be incurred in the transfer. The Air

Force has estimated that, during the period in which the transfer is to be accomplished--fiscal year 1965 through fiscal year 1967--savings of about $11.8 million will be realized as the Rome functions are transferred on a phased basis. The Air Force anticipated that these estimated savings would be offset by the costs of relocating personnel, equipment, and material; other personnel costs; and costs of altering, building, or modifying facilities at the locations receiving the additional functions; which were estimated at about $6.3 million. The Air Force has estimated that, after the transfer is completed, savings of about $9.9 million a year will be realized, starting with fiscal year 1968. In arriving at these saving estimates, the Air Force considered the salaries for the number of military and civilian personnel who could be eliminated from the Logistics Command's authorized strength and the anticipated reductions in various operating expenses.

We have analyzed the Air Force estimates of savings anticipated as a result of transferring the functions of Rome Air Materiel Area, as well as the costs which will be incurred to accomplish the move. Of the estimated savings of $11.8 million for fiscal years 1965 through 1967 and the anticipated annual savings thereafter of about $9.9 million a year, we were able to identify about $2 million and $2.7 million, respectively, which did not appear to be savings properly attributable to the transfer.

With regard to the major portion of the savings attributed to the transfer by the Air Force, we are unable to determine the reasonableness of the Air Force estimates because the Air Force has not provided sufficient detailed support for the single most important factor affecting the estimates, that is, the number of personnel spaces that can be eliminated from the Logistics Command's authorized personnel strength as a result of the transfer. We were informed that the detailed work to arrive at this estimate was performed by one officer in order to avoid premature widespread concern over the proposed closing

during the early planning stages and that the officer was instructed to and did destroy the detailed papers supporting the estimate. Air Force officials have stated, however, that recent detailed planning for the first phases of the transfer indicates that the original estimates were reasonably accurate.

With respect to the relocation costs which the Air Force expects to incur, we found that the estimated cost of $3.6 million for constructing additional facilities at the air materiel areas receiving the functions of Rome Air Materiel Area appeared to be understated by about $1 million. We found no basis on which to question other elements of the estimated relocation costs.

It is generally recognized in the Air Force that some difficulties will be experienced in a transfer of management responsibilities of this magnitude. The Air Force believes, however, that such problems will be temporary and can be overcome by special attention as required. From an audit standpoint, it is not possible for us to predict the extent to which the Air Force will experience a loss of management capability by not having the management of electronic ground-communications equipment centralized at a single location, nor is it possible for us to predict whether the savings anticipated will actually be realized.

This report is also being submitted today to Senator Kenneth B. Keating and Congressman Alexander Pirnie. We plan to make no further distribution of this report unless copies are specifically requested, and then only after appropriate approval has been obtained or public announcement has been made concerning the contents of the report.

Sincerely yours,

/s/ Joseph Campbell

Comptroller General of the
United States

* * *

REPORT ON DEPARTMENT OF DEFENSE PLAN TO TRANSFER THE FUNCTIONS OF THE ROME AIR MATERIEL AREA FROM GRIFFIS AIR FORCE BASE, NEW YORK

INTRODUCTION

The General Accounting Office has examined into various aspects of the Department of Defense decision to transfer the functions of the Rome Air Materiel Area from Griffiss Air Force Base, New York. Our review was made pursuant to a joint request by Senators Jacob K. Javits and Kenneth B. Keating and Congressman Alexander Pirnie of New York, in which we were asked to review the Department of Defense plans to close the Rome Air Materiel Area and the Schenectady Army Depot. (See appendix.) Our findings with respect to the latter installation were submitted by letter dated March 16, 1964 (B-153174).

Our review was directed primarily toward a verification of the accuracy of statistical data furnished by the Air Force in support of the decision to effect the transfer and an evaluation of the reasonableness of Air Force estimates of the savings anticipated as a result of the transfer. We did not attempt to evaluate the overall impact of the proposed transfer on the economy of the Rome, New York, area, nor could we determine what the long-term cost to the Government may be to restore, through other programs, the employment being transferred from that area by the Department of Defense. From the information available in Air Force records, we could not determine whether equivalent or greater savings could be achieved through other means of realigning the structure of the Air Force Logistics Command. Our scope was further limited in that we cannot, from an audit standpoint, fore-

cast the extent to which this transfer may affect the capability of the Air Force Logistics Command to perform its logistics support mission with respect to commodities managed by the Rome Air Materiel Area.

* * *

PLAINTIFF'S EXHIBIT D

SMAMA P-431	Total Maintenance (Manhours)			
Organic Workload	8,400,270	7,796,731	7,698,682	7,071,898 = 15.8% Decrease
Personnel	6,732	6,547	6,497	6,497
Dir Mnhr Avail	7,515,607	7,309,073	7,253,253	7,253,253

OCAMA P-431	Total Maintenance (Manhours)			
Organic Workload	10,263,399	9,848,415	9,891,243	9,743,702 = 5.1% Decrease
Personnel	8,660	8,522	8,458	8,458
Dir Mnhr Avail	9,447,197	9,296,652	9,226,835	9,226,835

ROAMA P-431	Total Maintenance (Manhours)			
Organic Workload	687,267	775,025	859,462	887,649 = 12.9% Increase
Personnel	504	491	488	488
Dir Mnhr Avail	577,304	562,413	558,977	558,977

DEFENDANTS' EXHIBIT C

HEADQUARTERS
ROME AIR MATERIEL AREA
UNITED STATES AIR FORCE
GRIFFIS AIR FORCE BASE, NEW YORK 13442

Office of the Commander July 31, 1964

SUBJECT: Procedures for Reducing the Adverse Impact of Phase-Down on ROAMA Employees

TO: ALL ROAMA EMPLOYEES

1. In line with General Root's policy of keeping each employee informed, I have attached a letter and attachment from Hq Air Force Logistics Command on the above subject. The attachment gives the detailed procedures to be used in assisting all employees who are or will be affected by the phase-down of ROAMA.

2. I want to be sure that every employee so affected understands the extent to which placement assistance is available and just what the employee has to do to get this help. You are eligible for this out-placement assistance when: (a) you have been notified that you are or will be surplus, or (b) you have declined an official offer to transfer with your function, or (c) you are identified for a future functional transfer and have declared your intention, in writing, to decline such an offer when made.

3. As and when you fall into one of the above categories, you are eligible to participate in the out-placement program in addition to consideration for vacancies which occur at this Base. It is important to point out that this installation is reducing in strength and that the probability of reassignment to another position at Griffiss is not very bright. You must give serious consideration to the employment prospects in this area and weigh them against continuing employment at another Air

Force or Federal installation or agency in some other geographical area. The decision is not an easy one but every affected employee must face the fact that it may be necessary to move where there is work in his or her chosen line of endeavor.

4. To help you in your selection of a location or locations when you decide you want out-placement assistance, lists of vacancies at other Air Materiel Areas and other Federal agencies are maintained in Room 24 of Bldg. 301. These listings may assist you to choose an acceptable area and the lowest grade of position you will accept. When a vacancy occurs at a location acceptable to you and at a grade within the range agreed upon you will be considered for the position and an offer made. If you accept the offer, transfer arrangements will be made promptly. If you decline the offer, there can be no assurance that another offer will be made.

5. You are urged to retain this letter and attachments for ready reference as it presents the details of the procedure which will be followed in the out-placement program during the entire phase-down period.

/s/ George E. Harrington
GEORGE E. HARRINGTON
Colonel, USAF
Deputy Commander.

HEADQUARTERS
AIR FORCE LOGISTICS COMMAND
UNITED STATES AIR FORCE
WRIGHT-PATTERSON AIR FORCE BASE, OHIO 45433

Reply to Attn of : MCACE

July 2, 1964

SUBJECT: Procedures for Reducing the Adverse Impact of Phase-Down on ROAMA Personnel

TO:				
	MAAMA	OOAMA	SBAMA	2802 Inertial Guidance & Calbr Gr
	MOAMA	ROAMA	SMAMA	2704 AF Acft Stor Dspn Gp
	OCAMA	SAAMA	WRAMA	2750 AB WG

(Commander & Civilian Personnel Officer)

1. The attached procedures are submitted for your information and use in implementing the provisions of a letter from this Headquarters dated 8 June 1964, subject, Reducing the Adverse Impact on ROAMA Personnel, with an attached Memorandum dated 27 April 1964, subject, Civilian Personnel Procedures Relative to the Phase-Out of the Rome Air Materiel Area, from the Secretary of the Air Force to the Secretary of Defense.

2. These procedures apply to vacancies in organizations serviced by AFLC CCPO's and to vacancies in the 2704th AF Aircraft Storage and Disposition Group which is serviced by the Davis-Monthan AFB CCPO. The freeze provisions become effective 10 July 1964. All vacancies existing at AFLC installations and those in the 2704th AF Aircraft Storage and Disposition Group as of 10 July 1964, and those that occur thereafter, are frozen until cleared by ROAMA in accordance with the attached procedures.

3. These instructions supersede those contained in paragraph 8, Annex I, AFLC Programming Plan 64-3, and in message MCACE

41497 dated 25 May 1964. AFLC Program Plan 64-3 will be amended accordingly.

FOR THE COMMANDER

/s/ G. S. Geanetos
G. S. GEANETOS
Colonel, USAF
Deputy Director, Personnel
and Support Operations

PROCEDURES FOR REDUCING THE ADVERSE IMPACT OF PHASE-DOWN ON ROAMA PERSONNEL

PART I

ROAMA will:

a. Identify and survey personnel by 1 July 1964 as required by paragraph 1.a., b., and c., of the Plan attached to the Secretary of the Air Force Memorandum dated 27 April 1964. This identification and survey will cover those employees to be transferred in Phase I (transfers of functions to OCAMA and WPAFB in July and August 1964 and February 1965) of the ROAMA phase down and those who will be surplus as a result of Phase I transfers. Identification for Phase II transfers (FY 66/67) will be accomplished by 15 March 1965 provided transfer phasing is determined by Hq AFLC by that date based upon development of an AFLC Programming Plan.

b. Obtain and maintain from each identified employee his signed indication of whether he desires placement assistance (see attached format). The following additional information will be maintained for those who desire assistance:

(1) Acceptable locations

(2) Lowest acceptable grade

(3) Completed supervisory appraisal containing a supervisory certification for continued AF employment.

(4) Available test results

(5) (a) Effective date of RIF separation

(b) Is or will be surplus and effective date

(c) Does not wish to transfer with function - effective date of separation.

c. Develop a system to determine employee availability, and release within 3 work days of receipt of bi-weekly vacancy list submitted by/for AFLC activities, or vacancies reported individually or by weekly supplement, those vacancies not needed for freeze placement purposes.

d. Negotiate placement of eligible employees who are recommended for continued AF employment with the activity or activities having vacancies. This can be accomplished by telephone. In few cases should it be necessary to forward an application and supporting documents to the activity having a vacancy for review prior to selection. If vacancies occur simultaneously at more than one installation for which an employee is available/qualified, negotiate placement at the installation of the employee's choice.

(1) Identified employees must meet only minimum qualification standards for the position as stated in Civil Service Handbook X-118, or X-118A, in the Civil Service examination announcement, or other qualification standards approved by the Commission for that type of position.

(2) (a) Negotiate placement for employees according to the following priorities when more than one employee is eligible for a vacancy:

1 Affected in 1964

2 Affected in 1965

3 Affected in 1966
4 Affected in 1967

(b) Priorities within each of the above groups are as follows:

1 Have been reached for RIF separation
2 Are or will be surplus
3 Do not wish to transfer with their function

(c) Further priority within each of the above groups will be based upon transfer/separation dates e.g., those with the earlier separation/functional transfer date will be selected before those with a later separation/transfer date.

(d) Ties will be decided based upon qualifications, then service computation date and retention sub-group.

e. Offer the position to the employee once placement is negotiated. Allow the employee 4 days to accept or reject the offer. At the end of 4 days advise the activity having the vacancy of the employee's decision, and negotiate the placement of another eligible employee if the employee to whom the vacancy was offered, declines, or release the vacancy for other placement.

f. Maintain records of position offers made, accepted, and declined by grade and location.

PART II

AFLC CCPO's will:

a. Clear all vacant positions, except those expected to exist for less than 3 months, with the ROAMA CCPO.

b. Initially submit by 13 July 1964 to the ROAMA CCPO a list of all vacancies as of 10 July 1964 in all organizations serviced by them except those that have been committed to individuals through hire and

in-service actions and those required to

(1) Honor statutory or administrative return or reemployment rights or

(2) Place employees affected by RIF in their competitive area. Thereafter a vacancy list will be submitted to the ROAMA CCPO by-weekly. Vacancies that occur between reporting periods will be reported individually to ROAMA as they occur or by vacancy list submitted on alternate weeks if earlier clearance is desired. Vacancy lists will contain:

Line number for each category of vacancy.
Number of vacancies in each category.
Designation, series, grade.
Salary for hourly rated positions.
Duty station if different from reporting installation.
Time position expected to continue if for at least 3 months but not more than 1 year.

c. Forward to the ROAMA CCPO within 2 days of receipt of information from the ROAMA CCPO of vacancies not released, a description for each position not released by the ROAMA CCPO.

d. Negotiate placements with the ROAMA CCPO. In those rare cases where an application and supporting documents are requested and received, advise the ROAMA CCPO within 4 work days of receipt, of the selection of the employee.

e. Once vacancies are released they will remain released unless ROAMA advises an installation that candidates are available and that the specific category of position is frozen again.

PART III

The CCPO, Davis-Monthan AFB will apply the procedures contained in Part II for vacancies in the 2704th AF Aircraft Storage and Disposition Group.

PART IV

General:

a. Employees who are identified according to the schedule contained in Part I.a., and decline participation in the placement program at the time of the survey may change their decision and participate at any time as long as they are on ROAMA rolls and meet identification criteria described in paragraph 1.a., and b., of the Plan attached to the SAF Memorandum dated 27 April 1964. ROAMA will advise such employees that this action reduces the time available for placement purposes.

b. Employees will be allowed 30 calendar days from date of acceptance of an offer, to the date they are to report to the recipient activity for duty. The employee, ROAMA, and activity having the vacancy, may mutually agree upon a longer or lesser period of time before the employee is to report to the activity having the vacancy.

c. If an employee declines an offer of a non-temporary position (those expected to exist for more than 1 year)

(1) At his current grade at an installation he specified as being acceptable, all placement assistance under this program will be terminated.

(2) At a grade lower than his current grade, all placement assistance at the grade declined and at lower grades will be terminated. He will continue to be included in the program for grades above that which he declined.

(3) Placement assistance also will be terminated for an employee if his position is deleted from the surplus list, he is no longer eligible for functional transfer because he accepted another assignment, or he separates from ROAMA rolls for any reason.

d. In the event negotiations for placement in a reported vacancy are unsuccessful, the ROAMA CCPO will forward the following to Hq AFLC (MCAC):

(1) Position Description.
(2) SF-57 supporting documents.
(3) Dates negotiation commenced and ended.

ROAMA will not clear the vacancy until a decision is rendered by Hq AFLC to ROAMA and to the activity having the vacancy.

e. The freeze provisions of the Secretary of the Air Force Memorandum dated 27 April 1964, subject, Civilian Personnel Procedures Relative to the Phase Out of the Rome Air Materiel Area, will continue in operation until

(1) All identified employees have been placed or otherwise withdrawn from the program or
(2) Information is received from this Headquarters or higher authority that the provisions are no longer applicable.

f. Employees identified according to the provisions of paragraph 1.a., and b., of the Plan attached to the SAF Memorandum of 27 April 1964 may submit an application/resume through the ROAMA CCPO to not more than 10 AF bases outside the AFLC for consideration under the provisions of Hq USAF letter dated 1 July 1963, subject, Minimizing the Adverse Effects of Reduction in Force. NOTE: There is no need for the employee to send, through the ROAMA CCPO, such applications/resumes to addressee AFLC activities since the employees receive higher placement priority at AFLC activities under the freeze provisions than they would under priorities included in the 1 July 1963 letter.

g. If an eligible employee declines to participate in the DOD Regional Placement Program of 24 July 1963, the AF RIF Placement Program of 1 July 1963, and the placement program described herein, or if he has participated in one or more of the programs but an offer

has not been made within 90 days of the proposed separation at a grade and location listed as being acceptable, ROAMA will refer details of the problem to Hq AFLC 90 days prior to the proposed separation for decision on action to be taken. This information will include as appropriate:

(1) A copy of the SF-57.
(2) Service Computation Date.
(3) Retention Sub-Group.
(4) Identification of placement programs in which the employee participated and date participation commenced.
(5) List of acceptable AF and AFLC installations and/or non-acceptable installations if any specified by the employee under the DOD Placement Program.
(6) Lowest acceptable grade.
(7) Reasons given by the employee for not participating in one or more of the programs.

DEFENDANTS' EXHIBIT M

State of New York)
County of Oneida) ss.:
City of Rome)

Raymond C. Galen, being duly sworn, deposes and says:

1. I am the Chief of the Employment and Placement Branch of the Civilian Personnel Division of Rome Air Materiel Area Griffiss Air Force Base, New York and have held this position for the past three months. For the eight years immediately prior to this I was the Chief of the Employment Branch at the same installation.

2. As Chief of the Employment Branch the knowledge of the following facts was available to me. As Chief of the Employment and Placement Branch I am responsible for the accomplishment of functional

transfers and placement assistance to those who decline offers.

3. The following statistics concerning the first increment of the ROAMA phase-down are true and correct to the best of my knowledge and belief.

a. In this first increment, 404 employees were offered functional transfers at their present grade and salary. 208 accepted and 196 declined the offers. Of the declinees, 19 stated that they desired placement at other locations and 156 stated that they would accept placement at Griffiss Air Force Base only. The balance declined help, resigned, retired or found jobs on their own. Offers were made and are being made to the declinees as vacancies occur, based on the expressed desires of the employee as to acceptable locations and salary.

b. To 1 September 1964, 13 transfer declinees have been placed at other installations and 83 have accepted offers at Griffiss Air Force Base. There are 60 declinees still on Griffiss Air Force Base rolls to be placed.

/s/ Raymond C. Galen

[Certificate of Service on September 11, 1964]

DEFENDANTS' EXHIBIT N

PLAN FOR RELOCATION OF THE PROCUREMENT AND SUPPLY MISSION OF THE ROME AIR MATERIEL AREA GRIFFISS AIR FORCE BASE

* * *

3. The 'before and after" personnel strength at Griffiss will then be as follows:

	Personnel Strength at Griffiss AFB			
	Today	End FY 1967	Gross Reduction	Net AF Personnel Reductions
a. ROAMA (AFLC)				
1. World-wide procurement & supply mission	2,761	--	2,761	*1,190
2. DSA transfers	213	--	213	213
3. Specialized logistical functions	732	732	--	--
4. Administrative, hospital & housekeeping	3,167	3,167	--	--
Subtotal	6,873	3,899	2,974	1,403

* These are the only savings directly affected by the planned inactivation.

II. PHASING PLAN

A. A gradual phase-out of the ROAMA world-wide procurements and supply mission is desirable for three reasons:

1. To assure that there is no loss of effectiveness in the support of the "L" systems.

2. To minimize the movement and relocation costs, and

3. To assure that the Secretary of Defense commitment of a job offer to every employee whose job is eliminated can be met.

B. After considering all of these requirements, a tentative phasing plan has been developed, which envisions the following for the 2,761 manpower spaces affected: *

Fiscal Year	Number of Positions to be Phased Out	Comment
1964	180 (6.5%)	Transfer of cataloguing and standardization functions to AFLC headquarters.
1965	809 (29.2%)	Movement of management responsibility covering the most critical communications, navigational aids, command and control systems. Of this number 199 spaces will be eliminated, 610 moved to new locations.
1966	*1,135 (41.2%)	Movement of Management responsibility for remaining classes to other AMA's. Of this number, 615 spaces will be eliminated and 520 transferred to other locations.

1967	*637 (23.1%)	Movement of remaining spaces (largely associated with warehousing and transportation). Of this number, 376 spaces will be eliminated and 261 moved to new locations.
Total	2,761 (100.0%)	

The above plan is subject to further refinement, with the final choice of gaining locations yet to be made.

III. SUMMARY

In summary, it has been found that the ROAMA procurement and supply mission - now staffed by 2,761 personnel - can be consolidated efficiently at other AMA's by FY 1967 with the following results:

-Minimum net savings of 935 manpower spaces - one-third of those now employed - and gross savings of 1,190 spaces if warehousing manpower reductions are included as a credit to the ROAMA inactivation.

-Annual payroll savings of $7.2 to $8.9 millions, plus operating expense saving of an additional $1.4 million. Hence, total recurring savings are $8.6 to $10.3 million.

-One-time relocation costs not to exceed $6.3 million. Offsetting this is the avoidance of construction costs otherwise required at ROAMA of $5 million during the next five years.

* This is exclusive of the 213 DSA spaces to be lost in FY 1966 and 331 non-AFLC spaces to be lost by end FY 1967.

BRIEF FOR APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19099

EGISTO JOSEPH VENTURINO, *et al.*, APPELLANTS

v.

ROBERT S. MCNAMARA, Secretary of Defense;
EUGENE M. ZUCKERT, Secretary of the Air Force,
APPELLEES

Appeal from the United States District Court for the District of Columbia

---

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
ELLEN LEE PARK,
JOHN A. TERRY,
Assistant United States Attorneys.

C.A. No. 1881-64

QUESTIONS PRESENTED

Appellants, four employees of the Rome Air Materiel Area (ROAMA) and a businessman in Rome, New York, sued in the District Court for an injunction against the Secretary of Defense and the Secretary of the Air Force. Alleging prospective loss of employment and other economic injury, and suing in their own behalf and on behalf of others similarly situated, appellants sought to enjoin appellees from carrying into effect a previously announced plan to close ROAMA and transfer its functions to other installations in other parts of the country. The decision to close ROAMA had been made by the Secretary of Defense pursuant to statutory authority. Appellants contended, however, that the Secretary had violated the statute under which he purported to act by failing to consider certain factors which they deemed significant. The District Court dismissed the complaint for lack of jurisdiction. On appeal from the order of dismissal the following questions are presented:

1. Is this an unconsented suit against the sovereign barred by sovereign immunity?
2. Do appellants have standing to sue?
3. Is judicial review of the Secretary's decision to close ROAMA foreclosed by the principle of separation of powers?

INDEX

	Page
Counterstatement of the case	1
Statute involved	4
Summary of argument	5
Argument:	
The District Court properly dismissed the complaint for lack of jurisdiction	6
A. This is an unconsented suit against the sovereign	7
B. Appellants lack standing to sue	10
C. The decision to close ROAMA is within the discretion of appellees and is thus not subject to judicial review	13
Conclusion	16

TABLE OF CASES

**Adams* v. *Nagle*, 303 U.S. 532 (1938)	10, 15
Aetna Life Ins. Co. v. *Haworth*, 300 U.S. 227 (1937)	13
**Alabama Power Co.* v. *Ickes*, 302 U.S. 464 (1938)	11, 12
Alabama State Federation of Labor v. *McAdory*, 325 U.S. 450 (1945)	13
Armstrong v. *United States*, 233 F. Supp. 188 (S.D. Cal. 1964)	13
Duba v. *Schuetzle*, 303 F.2d 570 (8th Cir. 1962)	11, 15
**Dugan* v. *Rank*, 372 U.S. 609 (1963)	7, 8
Duke Power Co. v. *Greenwood County*, 302 U.S. 485 (1938)	11
Hammond v. *Hull*, 76 U.S. App. D.C. 301, 131 F.2d 23 (1942), *cert. denied*, 318 U.S. 777 (1943)	13
Harmon v. *Brucker*, 355 U.S. 579 (1958)	8
Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U.S. 123 (1951)	11
Kansas City Power & Light Co. v. *McKay*, 96 U.S. App. D.C. 273, 225 F.2d 924, *cert. denied*, 350 U.S. 884 (1955)	11
Land v. *Dollar*, 330 U.S. 731 (1947)	6, 9, 13
**Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949)	7, 8, 9, 10
Malone v. *Bowdoin*, 369 U.S. 643 (1962)	7, 8
**Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137 (1803)	7, 13, 16
Martin v. *Hunter's Lessee*, 1 Wheat. (14 U.S.) 304 (1816)	10
Massachusetts v. *Mellon*, 262 U.S. 447 (1923)	11
Mine Safety Appliances Co. v. *Forrestal*, 326 U.S. 371 (1945)	14
Pauling v. *McNamara*, —— U.S. App. D.C. ——, 331 F.2d 796 (1963), *cert. denied*, 377 U.S. 933 (1964)	15

Cases—Continued Page

*Perkins v. Lukens Steel Co., 310 U.S. 113 (1940) 11, 12
Schilling v. Rogers, 363 U.S. 666 (1960) 13
Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950) 13
*Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1939) 11
Texas State AFL-CIO v. Kennedy, 117 U.S. App. D.C. 343, 330 F.2d 217, cert. denied, 379 U.S. 826 (1964) 12
United States v. Lee, 106 U.S. 196 (1882) 8
*United States ex rel. Brookfield Constr. Co. v. Stewart, 234 F. Supp. 94 (D.D.C.), aff'd, —— U.S. App. D.C. ——, 339 F.2d 753 (1964) 15
West Coast Exploration Co. v. McKay, 93 U.S. App. D.C. 307, 213 F.2d 582, cert. denied, 347 U.S. 989 (1954) 6, 13, 14

OTHER REFERENCES

Act of July 26, 1947, ch. 343, § 2, 61 Stat. 496, as amended, P.L. 85-599, § 2, 72 Stat. 514 (1958), 50 U.S.C. § 401 5
28 U.S.C. § 1361 13
U.S. Const., Art. III, § 2 10

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19099

EGISTO JOSEPH VENTURINO, *et al.*, APPELLANTS

v.

ROBERT S. MCNAMARA, Secretary of Defense;
EUGENE M. ZUCKERT, Secretary of the Air Force,
APPELLEES

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

This is an appeal from an order of the District Court (J.A. 18) denying a motion for a preliminary injunction and dismissing a complaint against appellees. In their complaint (J.A. 1-13) appellants sought an injunction against the Secretary of Defense and the Secretary of the Air Force to prevent them from carrying into effect a previously announced plan to close the Rome Air Materiel Area (ROAMA) at Griffiss Air Force Base in Rome,

New York, and relocate its facilities and personnel at other Air Materiel Areas in the United States.[1] Appellants' complaint was filed on August 3, 1964, and amended on September 1. They moved for a preliminary injunction on September 15 (J.A. 15-16); appellees countered on October 1 with a motion to dismiss (J.A. 16-17). After a hearing on both motions before Judge Tamm of the District Court, the order now appealed from was entered on November 2, 1964.

In December 1963 the Secretary of Defense announced that action was being initiated to discontinue or to reduce substantially activities at thirty-three defense installations—twenty-six in the United States and seven overseas—no longer required by the armed forces. One of those installations was ROAMA, whose functions were to be transferred to three other Air Materiel Areas in other parts of the country. ROAMA is the smallest of the nine Air Materiel Areas, both in authorized manpower spaces and in investment in facilities (Plaintiffs' Exhibit A,[2] p.4). It was selected for closing primarily because its workload could be relocated to other Air Materiel Areas having some experience in managing equipment similar to that presently managed at ROAMA and because these other Air Materiel Areas have overhaul and maintenance capabilities that are lacking at ROAMA (J.A. 19, Pl. Exh. A 7). It was estimated that the transfer of ROAMA functions would effect savings of $11.8 million for fiscal years 1965 through 1967 and about $9.9 million annually thereafter (J.A. 20). The plan called for a gradual phase-out of ROAMA activities in several stages extending into 1967 in order to minimize the impact of the transfer on ROAMA employees and on the surrounding community (J.A. 35-37). Detailed procedures were worked out to enable ROAMA

[1] Alternative relief was requested in the form of a declaratory judgment declaring that the Secretary of Defense had violated the law "inherent in" 10 U.S.C. § 125 "by not following its provisions" (J.A. 13).

[2] Exhibits will be cited herein as "Pl. Exh." and "Def. Exh."

employees to transfer with their functions or to obtain other employment either at Griffiss Air Force Base or at other federal installations away from Rome (Def. Exh. C, J.A. 24-33; see also Def. Exh. D, E, F, G, I, J and L). During the first stage of the ROAMA phase-out functional transfers were offered to 404 employees at their present grade and salary; 208 of them accepted the offers. Of the 196 who declined, 156 stated that they would accept placement only at Griffiss Air Force Base; nineteen requested placement at other locations, and the remaining twenty-one declined placement assistance, retired, resigned, or found jobs on their own. Offers have been made to the declinees as vacancies have arisen, based on the expressed desires of each employee as to acceptable location and salary (J.A. 34).

The instant litigation was instituted by appellants "in their own behalf as well as on behalf of all others similarly situated as employees of ROAMA or as persons whose livelihood depends on the continued presence of ROAMA at Griffiss Air Force Base" (J.A. 2-3).[3] In their complaint appellants referred to a report by the Comptroller General[4] based on a study of the ROAMA transfer plan made by the General Accounting Office at the request of the two Senators from New York and the Congressman whose district includes Rome. The GAO had found that of the estimated savings of $11.8 million for fiscal 1965 through 1967 and $9.9 million annually thereafter, approximately $2 million and $2.7 million, re-

[3] Two of the five appellants, Egisto Joseph Venturino and Robert L. Griffiths, are presidents of two local unions of government employees at Griffiss Air Force Base; they were authorized to join in this action by the members of their respective unions. Appellants Don B. Davidson, Jr., and Alex S. Sisti are individual ROAMA employees. The fifth appellant, Samuel Wardwell, Jr., is a local hardware merchant, a former mayor and city councilman of Rome and an active member of the Chamber of Commerce; his sole connection with ROAMA appears to be the business he receives by reason of its presence in Rome.

[4] Pl. Exh. A.

spectively, did not appear to be savings properly attributable to the transfer. They further found that the anticipated cost of $3.6 million for constructing additional facilities at the installations to which ROAMA functions would be transferred appeared to be underestimated by about $1 million. The GAO found no basis for questioning other elements of the estimated relocation costs but was unable to reach a conclusion as to the reasonableness of the estimated savings because of insufficient supporting data; the Air Force informed the GAO, however, that recent detailed planning for the first phases of the transfer indicated that the original estimates were reasonably accurate. (J.A. 20-21.) Appellants also alleged that they and other inhabitants of the Rome area, together with the City of Rome and its Enlarged School District, had expended large sums of money and had incurred obligations in reliance on certain public representations made by officials of the Department of Defense to the effect "that ROAMA was needed, that its missions would be continued, . . . that ROAMA had a bright future, and . . . that ROAMA would remain active at Rome . . ." (J.A. 10). Appellees moved to dismiss the complaint for lack of jurisdiction of the subject matter. The motion was granted; the complaint was dismissed, and the case is now before this Court.

STATUTE INVOLVED

Title 10, § 125(a), United States Code, provides in pertinent part:

> Subject to section 401 of title 50,[5] the Secretary of Defense shall take appropriate action (including

---

[5] The statute referred to is a so-called "Congressional declaration of purpose." It provides in part:

> In enacting this legislation, it is the entent of Congress . . . to eliminate unnecessary duplication in the Department of Defense, and particularly in the field of research and engineering by vesting its overall direction and control in the Secretary of

the transfer, reassignment, consolidation, or abolition of any function, power, or duty) to provide more effective, efficient, and economical administration and operation, and to eliminate duplication, in the Department of Defense. . . .

SUMMARY OF ARGUMENT

Although the complaint in the instant case is directed against appellees as individuals, in substance it reaches beyond them and seeks relief against the United States. The United States not having consented to be sued, this action is barred by sovereign immunity, for in the absence of such consent the court is without jurisdiction of the subject matter. There are two exceptions to this rule. If a government officer acts beyond the limits of his authority, or if, though he acts within the scope of his authority, his power to act or the manner in which that power is exercised is unconstitutional, then his actions may be judicially restrained without joining the sovereign as a party. The instant case, however, falls within neither of these exceptions, so that sovereign immunity stands as a bar to this litigation.

Moreover, appellants are without standing to sue. Their allegations of economic injury and prospective unemployment, substantial though they may be, are not sufficient to give them access to the courts. Appellees have breached no duty owed to appellants; they have invaded no legal right of appellants which a court can enforce. Nor can they sue as representatives of the community or as guardians of the public interest. Even assuming that appellees in some way violated the statute under which they acted, it does not follow that appellants are thereby empowered to challenge their action. The statute confers no litigable rights on appellants or on anyone similarly sit-

---

Defense; to provide more effective, efficient, and economical administration in the Department of Defense . . . .

Act of July 26, 1947, ch. 343, § 2, 61 Stat. 496, as amended, P.L. 85-599, § 2, 72 Stat. 514 (1958), 50 U.S.C. § 401.

uated. The hardships they may suffer as a result of the closing of ROAMA are *damnum absque injuria.*

Putting to one side the questions of sovereign immunity and standing, appellees submit that the complaint is insufficient on its face to entitle appellants to any relief at all. Appellants have conceded that the Secretary of Defense acted pursuant to statutory authority and that the statute under which he acted vests a limited discretion in him. Their principal contention essentially is that he abused that discretion in deciding to close ROAMA. But under the doctrine of separation of powers the exercise of discretion by the executive, whether right or wrong, in matters committed to executive determination cannot be inquired into by the judiciary. Moreover, the statute itself makes clear that the action of which appellants complain is within the discretion of the Secretary, subject to review only by Congress. Without explicit provision for judicial review, decisions such as the one here under consideration cannot be challenged in the courts.

ARGUMENT

The District Court properly dismissed the complaint for lack of jurisdiction

Although the order of dismissal (J.A. 18) does not recite the specific ground on which it is based, appellees submit that any or all of the three grounds advanced in their motion to dismiss (J.A. 16) provide ample support for the ruling of the District Court. It is elementary that if for any reason the court is without jurisdiction to decide the cause, it need not—indeed, cannot—reach the merits.[6] Accordingly, appellees will address themselves here to each of the three contentions urged upon the court below.

---

[6] *Land* v. *Dollar*, 330 U.S. 731 (1947), and *West Coast Exploration Co.* v. *McKay*, 93 U.S. App. D.C. 307, 213 F.2d 582, *cert. denied*, 347 U.S. 989 (1954), cited by appellants, are not to the contrary. See part C, *infra*.

A. *This is an unconsented suit against the sovereign.*

The king, it is said, can do no wrong. Although monarchy as a political institution has fallen on hard times, the foregoing proposition has retained its validity in the guise of the sovereign immunity doctrine. Corollary to that doctrine is the rule that the sovereign, whether a king ruling by divine right or a republican government deriving its sovereignty from the people, cannot be sued without its consent. These principles, as interpreted and applied by the courts, stand as a bar to the instant litigation.

Since long before *Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137 (1803),[7] it has been well established that the acts of a government officer in his official capacity are not subject to judicial restraint or interference. This rule is founded, in part, on the doctrine of sovereign immunity. This area of the law was thoroughly explored by the Supreme Court in *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), and later revisited in *Malone* v. *Bowdoin*, 369 U.S. 643 (1962), and *Dugan* v. *Rank*, 372 U.S. 609 (1963). Under *Larson* a suit for specific relief nominally brought against a government officer will not lie when the relief sought will in effect be obtained not against the individual officer but against the sovereign.

> For the sovereign can act only through agents and, when an agent's actions are retrained, the sovereign itself may, through him, be restrained. . . . [This question] arises whenever suit is brought against an officer of the sovereign in which the relief sought from him is not compensation for an alleged wrong but, rather, the prevention or discontinuance, *in rem*, of the wrong. In each such case the compulsion, which the court is asked to impose, may be compul-

[7] "Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct would be rejected without hesitation." *Marbury* v. *Madison*, *supra* at 170-171.

> sion against the sovereign, although nominally directed against the individual officer. If it is, then the suit is barred, not because it is a suit against an officer of the Government, but because it is, in substance, a suit against the Government over which the court, in the absence of consent, has no jurisdiction. *Larson*, *supra* at 688.

The Supreme Court in *Larson* recognized two equally well-established exceptions to the general rule. If the powers of a government officer are limited and he acts in excess of those powers,[8] or if, though his actions may be within the scope of his authority, his power to act under that authority is unconstitutionally conferred or is exercised in an unconstitutional manner,[9] he may be sued individually without the necessity of joining the sovereign. *Id.* at 689-691; *Dugan* v. *Rank*, *supra* at 621-622. These, however, are the only two types of cases in which the actions of a government officer may be restrained by the courts. Appellants do not allege, nor does there appear to be, any constitutional infirmity either in appellees' action or in the statute under which that action was taken. They do assert here that appellees, and particularly appellee McNamara, exceeded the authority vested in him by 10 U.S.C. § 125(a). They appear to concede, however, that no such assertion was made below. At page 16 of their brief they state:

> In appellants' complaint it is specifically alleged that the order to close and relocate ROAMA was issued pursuant to, but in violation of, 10 U.S.C.A. § 125(a). The allegation that appellees' order was a violation of the statute should suffice to confer jurisdiction on the court under the rule stated in *Larson* v. *Domestic & Foreign Commerce Corp.* and *Malone* v. *Bowdoin*, *supra*. It is implicit in the allegation of violation of the statute that the appellees acted in excess of the limitations specified therein.

---

[8] *E.g.*, *Harmon* v. *Brucker*, 355 U.S. 579 (1958).

[9] *E.g.*, *United States* v. *Lee*, 106 U.S. 196 (1882); see *Larson*, *supra* at 696-697.

But such "implicit" contentions are manifestly insufficient; explicit pleading is prerequisite to jurisdiction.

> [W]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. . . . His actions are *ultra vires* his authority and therefore may be made the object of specific relief. It is important to note that in such cases the relief can be granted, without impleading the sovereign, only because of the officer's lack of delegated power. *A claim of error in the exercise of that power is therefore not sufficient.* And, since the jurisdiction of the court to hear the case may depend, as we have recently recognized, [citing *Land* v. *Dollar*, *supra*] upon the decision which it ultimately reaches on the merits, *it is necessary that the plaintiff set out in his complaint the statutory limitation on which he relies. Larson*, *supra* at 689-690 (footnote omitted). [Emphasis added.]

Appellants' real contention, as analysis of their argument discloses (Brief for Appellants, 14-21), is not that the Secretary of Defense exceeded his powers [10] but that he exercised them improperly. This is a horse of quite another color. In the first place, the statute under which appellee acted contains no limitation on his powers which could be relevant here. It provides only that the exercise of the powers conferred by that statute shall be "subject to section 401 of title 50," which is merely a declaration of general legislative policy (see footnote 5, *supra*). In the second place, appellants seek judicial restraint of the Secretary of Defense on the ground that in deciding to close ROAMA he failed to take into consideration certain factors which they deem important. Their complaint is couched in terms of abuse of discretion,[11] thus affording

---

[10] Indeed, appellants unequivocally state in paragraph 14 of their complaint (J.A. 4) that "the ROAMA relocation was ordered by the defendant Secretary of Defense McNamara pursuant to authority granted by Congress in Public Law 87-651, 10 U.S.C.A. § 125 . . . ."

[11] Paragraph 26 of the complaint (J.A. 12) states in part:

> By reason of their [*sic*] failure to weigh adequately the

no jurisdictional predicate for judicial interference with the Secretary's actions. Even if his decision were incorrect or were based on errors either of fact or of law, the courts would be powerless to restrain him from acting. *Adams* v. *Nagle*, 303 U.S. 532, 542 (1938). The burden is on appellants to show that appellees, particularly the Secretary of Defense, went beyond the limits of their authority by specifying those limits in their complaint. *Larson*, *supra* at 690. They have not done so. They have thus failed to establish that this case comes within either of the two exceptions to the *Larson* rule. It necessarily follows that this is a suit against the sovereign to which it has not consented, and it is therefore barred by sovereign immunity.[12]

B. *Appellants lack standing to sue.*

The Constitution limits exercise of the federal judicial power to "cases" and "controversies." U.S. Const., Art. III, § 2; *Martin* v. *Hunter's Lessee*, 1 Wheat. (14 U.S.) 304 (1816). An essential element of every case or controversy is the standing of the plaintiff to sue. The powers of the courts cannot be invoked unless something has happened to affect the rights of the parties in their dealings with one another. "The touchstone to justiciability is in-

---

pertinent economic and military considerations as aforesaid, the defendant Secretary of Defense Robert S. McNamara has violated [10 U.S.C. § 125] and abused the discretion reposed in him thereby . . . .

Appellants concede at page 17 of their brief that the statute does vest "a limited discretion" in the Secretary.

[12] The *Larson* case also disposes of appellants' theory that appellees can be sued as individuals because they can personally grant the relief sought.

> [T]he action of an officer of the sovereign . . . can be regarded as so "illegal" as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void. *Larson*, *supra* at 701-702 (footnote omitted).

jury to a legally protected right . . . ." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 140-141 (1951) (opinion of Mr. Justice Burton). Appellants have not established, nor can they establish, that appellees' action has infringed upon some distinct and identifiable legal right so as to give them standing to seek relief. See generally *Massachusetts* v. *Mellon*, 262 U.S. 447 (1923).

Appellants base their claim to standing on their prospective loss of employment and, in the case of appellant Wardwell, loss of other economic benefit resulting from the closing of ROAMA. They assert that they have "a legitimate interest which is entitled to judicial protection . . . [which] reaches beyond the general interest that citizens of the Rome-Utica area have in the continuance of ROAMA . . ." (Brief for Appellants, 12). Even assuming that their interest in the continued presence of ROAMA at Rome is greater than that of the average citizen,[13] this fact alone does not give them standing. "It is by now clear that neither damage nor loss of income in consequence of the action of Government, which is not an invasion of recognized legal rights, is in itself a source of legal rights in the absence of constitutional legislation recognizing it as such." *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 125 (1940) (footnote omitted); see *Alabama Power Co.* v. *Ickes*, 302 U.S. 464 (1938). Appellants have alleged that appellees are violating an act of Congress, but they have not alleged or shown that by doing so appellee have invaded or threaten to invade any legal right personal to them. Even if appellees' decision to close ROAMA is illegal, its posited illegality is inadequate to confer standing upon appellants. *Tennessee Elec. Power Co.* v. *TVA*, 306 U.S. 118 (1939); *Duke Power Co.* v. *Greenwood County*, 302 U.S. 485 (1938); *Kansas City Power & Light Co.* v. *McKay*, 96 U.S. App. D.C. 273, 225 F.2d 924, *cert. denied*, 350 U.S. 884 (1955). The

---

[13] But see *Duba* v. *Schuetzle*, 303 F.2d 570, 573 (8th Cir. 1962).

mere prospect of economic disadvantage or disaster does not give appellants the key to the courthouse door. *Alabama Power Co.* v. *Ickes, supra; Texas State AFL-CIO* v. *Kennedy*, 117 U.S. App. D.C. 343, 330 F.2d 217, *cert. denied*, 379 U.S. 826 (1964).

The statute under which appellees acted, 10 U.S.C. § 125(a), was not enacted for the protection of appellants or others like them. Such restrictions as it imposes on executive action are intra-governmental, and for violation of them the Secretary of Defense is answerable only to Congress and perhaps to the President. It does not operate to bestow litigable rights on private individuals who may be adversely affected by any act done by the Secretary pursuant to § 125(a). The plain intent of Congress in enacting the statute was to authorize the Secretary to "take appropriate action" in furtherance of the previously declared legislative policy "to provide more effective, efficient, and economical administration, and to eliminate duplication, in the Department of Defense." See footnote 5, *supra*. Appellants have no standing to enforce the Secretary's responsibility or to represent the public interest in appellees' compliance with the statute. *Perkins* v. *Lukens Steel Co.*, *supra* at 127-129.

It is inevitable that the closing of a large military installation will have some impact upon a community which has come to depend upon its presence. The economy of the community may suffer; its population may decline; its attractiveness as a site for business and industry may diminish. Even more immediately affected are the employees of the installation, who may find themselves without jobs and unable to find other employment. But their economic and personal hardships do not entitle them to seek relief in the courts, either as individuals or as representatives of the community. Their losses, actual or prospective, are *damnum absque injuria*. Appellants have not shown that they have suffered a legal wrong—*i.e.*, an injury to a legal right—by reason of appellees' action.

Having suffered no wrong, they are without standing to seek legal or equitable relief.[14]

C. *The decision to close ROAMA is within the discretion of appellees and is thus not subject to judicial review.*

If this Court disagrees with appellees on the issues of sovereign immunity and standing, a preliminary decision on the merits for the limited purpose of resolving the jurisdictional issue will then be in order. *Land* v. *Dollar*, *supra; West Coast Exploration Co.* v. *McKay*, *supra.* The procedure to be followed is outlined in the *West Coast* case:

> Where a plaintiff asserts in his complaint that an officer of the Government is acting without power and that therefore his acts are invalid, the court, in determining the preliminary jurisdictional question whether or not the United States is a necessary party, is confronted with a problem arising out of the fact that the determination of that question involves passing upon the very question involved in the merits. . . . Since a court must determine at the outset its juris-

---

[14] For the same reasons appellants have no standing to seek a declaratory judgment, for which they sued below as an alternative to an injunction (J.A. 13). "The requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit." *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 461 (1945). The availability of declaratory relief presupposes the existence of a judicially remediable right. *Schilling* v. *Rogers*, 363 U.S. 666, 677 (1960); *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). See generally *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227 (1937).

Similarly, relief in the nature of mandamus under 28 U.S.C. § 1361 is not available. *Armstrong* v. *United States*, 233 F. Supp. 188 (S.D. Cal. 1964). Appellants have conceded (see footnote 11, *supra*) that the Secretary of Defense has some discretion to act under the statute, asserting only that he has abused it in this particular case. Mandamus, of course, will not lie to compel the performance of a discretionary act or to require that anyone's discretion be exercised in a particular way. *Marbury* v. *Madison*, *supra; Hammond* v. *Hull*, 76 U.S. App. D.C. 301, 131 F.2d 23 (1942), *cert. denied*, 318 U.S. 777 (1943).

> diction to consider a case presented, it is compelled to make a preliminary decision, for jurisdictional purposes, on the ultimate question in the suit, and this notwithstanding the fact that if jurisdiction to consider the case is recognized, and the merits of the claim for relief therefore heard, the court may, on the merits, be compelled to reach an opposite conclusion.
>
> The courts solve this problem by accepting at their face value, for jurisdictional purpose, the assertions of the complaint of want of power in the officer . . . and by giving the assertions thus accepted their natural jurisdictional consequences in respect of who are necessary parties. 93 U.S. App. D.C. at 317-318, 213 F.2d at 592-593 (footnote omitted).

See *Mine Safety Appliances Co.* v. *Forrestal*, 326 U.S. 371 (1945). The result of such a preliminary determination of the merits can only be to sustain the ruling of the District Court dismissing the complaint for lack of jurisdiction.

Under the *West Coast* test this action would lie against appellees only on the theory that they exceeded their statutory authority in deciding to close ROAMA.[15] Accepting the assertions of the complaint at their face value, however, the court cannot find any such want of power in appellees. On the contrary, the complaint expressly alleges that the ROAMA relocation was ordered by the Secretary of Defense pursuant to statutory authority (see footnote 10, *supra*). Appellants further acknowledge that the statute vests some discretion in the Secretary (see footnote 11, *supra*). Thus apart from the questions of sovereign immunity and standing, the complaint is insufficient on its face, even under the most liberal construction, to entitle appellants to any relief at all.

Assuming *arguendo* that the complaint is in proper form, it must nevertheless be dismissed for want of au-

---

[15] As noted in part A, *supra*, no constitutional issue is raised here by appellants.

thority in the courts to grant the relief sought. The statute under which the Secretary acted provides that he "shall take *appropriate* action . . . to provide more effective, efficient, and economical administration and operation, and to eliminate duplication, in the Department of Defense." 10 U.S.C. § 125(a) (emphasis added). The statutory language is clear; the only reasonable construction to be made, if indeed it needs to be construed at all, is that the determination of what action is "appropriate" is to be made by the Secretary of Defense, subject to review only by Congress as outlined in detail in the remainder of § 125(a). The action of which appellants complain was made pursuant to this statutory authority in the exercise of the Secretary's executive discretion. That exercise is not subject to judicial review. This is true regardless of whether the Secretary's decision is right or wrong, as long as he has the power to make it.[16] *Adams* v. *Nagle*, *supra*. The judiciary cannot substitute its judgment for that of the executive in matters entrusted solely to executive discretion by constitution and by statute. See *United States ex rel. Brookfield Constr. Co.* v. *Stewart*, 234 F. Supp. 94 (D.D.C.), *aff'd*, —— U.S. App. D.C. ——, 339 F.2d 753 (1964); *Duba* v. *Schuetzle*, *supra*; cf. *Pauling* v. *McNamara*, —— U.S. App. D.C. ——, 331 F.2d 796 (1963), *cert. denied*, 377 U.S. 933 (1964). In the words of Chief Justice Marshall:

---

[16] Appellants contend that the Secretary failed sufficiently to consider certain factors in arriving at his decision. Their complaint, however (see J.A. 4-5), along with their Exhibit A, clearly shows that substantial savings of public funds will in fact be effected by the closing of ROAMA. The final figures may perhaps be not as great as originally estimated, although Air Force officials have stated "that recent detailed planning for the first phases of the transfer indicates that the original estimates were reasonably accurate" (J.A. 21). But what difference does it make, as far as this litigation is concerned, whether the ultimate savings add up to $11.8 million or only $9.8 million? Appellees submit that even if the net amount saved were only one cent, the decision to close ROAMA would be clearly justifiable as an exercise of the Secretary's discretion and "appropriate" within the meaning of the statute.

> The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court. *Marbury* v. *Madison*, *supra* at 170.

The doctrine of separation of powers bars any intrusion by the judiciary into the domain of the executive.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
ELLEN LEE PARK,
JOHN A. TERRY,
Assistant United States Attorneys.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 770495 742